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RESISTANCE TO CHANGE. AN INTERNATIONAL LEGAL ARGUMENT OF SECESSION: POTENTIALS AND LIMITATIONS OF INTERNATIONAL LAW

Shorena Nikoleishvili

TURUN YLIOPISTON JULKAISUJA – ANNALES UNIVERSITATIS TURKUENSIS
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University of Turku

Faculty of Law
International Law
Doctoral Programme in Law

Supervised by

Assistant Professor, Mikko Rajavuori
University of Turku
Turku, Finland

Reviewed by

Professor, Wouter G. Werner
Vrije Universiteit Amsterdam
Amsterdam, Netherlands

Assistant Professor, Ukri Soirila
University of Helsinki
Helsinki, Finland

Opponent

Professor, Wouter G. Werner
Vrije Universiteit Amsterdam
Amsterdam, Netherlands

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ABSTRACT

This dissertation delves into the intricacies of the international law surrounding secession, aiming to elucidate its complexities and challenges. While international law provides a definitive definition of secession, the practical application often diverges from this clarity. Despite the existence of certain categories of secession deemed legally permissible, the reality often falls short, with even legitimate claims failing to garner recognition.

Moreover, while there may be limited avenues for peoples to assert certain rights, such assertions seldom translate into formal recognition of their formal existence on the international plane. Economic and legal rights ensured at international forums may secure interests to be acknowledged, yet they often remain subordinate to the political rights of already recognized states. This hierarchical prioritization of rights underscores the enduring dominance of established state interests over those of emergent ones.

Examining the rationale behind prevailing forms of secession, particularly evident in the former Soviet republics, reveals a complex interplay of historical legacies and power dynamics. The influence of entities like the Russia Federation, rooted in notions of imperialism and historical precedents dating back to the mandatory system from the era of the League of Nations, underscores the enduring impact of standard of civilization in shaping contemporary secessionist movements.

In conclusion, this research offers a critical analysis of the international legal framework surrounding secession, shedding light on its ambiguities and underlying power dynamics. By examining cases and historical precedents, it contributes to a deeper understanding of the complexities inherent in the concept of secession within the realm of international law.

KEYWORDS: international law, self-determination, secession, sovereignty, decolonization, recognition, conflicts, people, territory, borders.

TURUN YLIOPISTO
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TIIVISTELMÄ

Tässä väitöskirjassa pureudutaan siihen monitahoiseen kansainvälisen oikeuden ongelmaan, joka liittyy kansojen itsemäärämisoikeuteen kuuluvaan oikeuteen irtautua ja perustaa oma valtio. Huolimatta kansainvälisen oikeuden tunnustamasta ja verrattain selkeästi määrittelemästä, erityisesti entisille siirtomaille kuuluvasta oikeudesta irtautua, on tämän oikeuden soveltaminen käytännössä usein osoittautunut haastavaksi. Kansainvälisen oikeuden formaalisti tunnustama oikeus irtautua jääkin usein täyttymättä.

Kansalla itsellään on kansainvälisessä oikeudessa vain rajallisesti mahdollisuuksia vedota sille muodollisesti kuuluvaan itsemääräämisoikeuteen. Kansainvälisen oikeuden perinteiset keinot riitojen ratkaisuun on vain tunnustettujen valtioiden hyödynnettävissä. Oikeuden pirstaloitumisen ja kansainvälisten tuomioistuinten lisääntymisen myötä kansoille on tarjoutunut uudenlaisia mahdollisuuksia vaatia oikeuksiensa ja etujensa turvaamista. Uudet oikeudelliset foorumit eivät kuitenkaan ole tarjonneet keinoja poliittisten oikeuksien saavuttamiseksi, vaan ne ovat rajoittuneet olemassa olevien valtioiden velvollisuuksien selvittämiseen tai rajatummin kansalle kollektiivina kuuluvien (taloudellisten) etujen turvaamiseen. Nämä oikeudet ovat kuitenkin alisteisia jo tunnustettujen valtioiden täysivaltaisuudelle, mikä korostaa valtioiden alueellista koskemattomuutta kansoille kuuluvan irtautumisoikeuden sijaan.

Erityisesti entisissä neuvostotasavalloissa ilmenevien irtautumisen muotojen taustalla olevien syiden tarkastelu paljastaa historiallisten perintöjen ja valtadynamiikan monimutkaisen vuorovaikutuksen. Venäjän federaation kaltaisten entiteettien vaikutus, joka perustuu imperialismin käsitteisiin ja Kansainliiton aikakauden pakollisesta järjestelmästä juurensa juontaviin historiallisiin ennakkotapauksiin, korostaa sitä, kuinka käsitys sivistystehtävästä edelleen vaikuttaa separatistiliikkeiden muovautumiseen nykypäivänäkin.

Tämä tutkimus tarjoaa kriittisen analyysin valtioyhteydestä irtautumisen viitekehykseen kansainvälisessä oikeudessa ja valaisee sen epäselvyyksiä ja taustalla olevaa valtadynamiikkaa. Tapaustutkimusten ja historiallisten ennakkotapausten tarkastelun kautta se luo entistä syvempää ymmärrystä irtautumisen käsitteeseen liittyvistä kansainvälisen oikeuden monitahoisista säännöksistä.

AVAINSANAT: kansainvälinen oikeus, itsemääräämisoikeus, irtautuminen, suvereniteetti, dekolonisaatio, tunnustaminen, konfliktit, kansa, alue, rajat.

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Completing a dissertation is a complex journey that cannot be undertaken alone. Along this path, I have met many persons who have played pivotal roles in reaching this milestone. As I reflect on this journey, memories flood back to me—memories brimming with happiness, tireless effort, smiles, love, dedication, and, at times, sadness, and disappointment. The depth of gratitude I feel towards those who have supported me knows no bounds.

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Upon my arrival at the Faculty of Law at the University of Turku in Finland, I was warmly greeted by Mirkka Ruotsalainen and Mia Fager. Those days were very hard for me, both of them done way more for me then their job required. I remembered Mirkka accompanying me to the bank to help me open an account.

Writing this dissertation was a long journey for me. I had three periods of parental leave during that time. Everyone I met is very important to me. Life is not always easy, but when you are surrounded by such brilliant people, even the hard moments become bearable. Thank you all for this.

March 2024
Shorena Nikoleishvili

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List of Original Publications

This dissertation is based on the following original publications, which are referred to in the text by their Roman numerals:

I Shorena Nikoleishvili. Waiting for Abkhazia: Secession and Borders as International Legal Instruments in Contested Sovereignty. *Nordic Journal of International Law,* 2020; 89.1: 1-37.

II Harri Kalimo, Shorena Nikoleishvili. Sovereignty in the Era of Fragmentation–EU Trade Agreements and the Notion of Statehood in International Law. *Duke Journal of Comparative & International Law*, 2022; 32.2: 353-407.

III Shorena Nikoleishvili. State Recognition and the Case of Western Sahara: Past Experiences, Future Lessons. *Retfaerd,* 2023; 46: 41-52.

1 Introduction

1.1 My journey thus far

In August 2008, the internal strife between Georgia and the regions of Samachablo (South Ossetia)[1] and Abkhazia transcended local boundaries, transforming into an international conflict.[2] The repercussions of this escalation were harrowing. Russia deployed formidable military might against Georgia, resulting in the loss of countless lives, mass displacement, and widespread destruction. These cataclysmic events reverberated through the lives of numerous families carrying with them the enduring pain of Russian aggression.

I am no stranger to this pain. My family members found themselves ensnared in the war-torn expanse of Samachablo. Despite our fervent attempts to reach out to governmental authorities in a bid to ascertain their whereabouts, we were met with an unsettling silence. My maternal grandparents were trapped in this turmoil. They chose to remain on their land that was nestled within the conflict zone. They paid a heavy toll for their decisions: my grandfather, haunted by the spectre of those days spent under Russian occupation, eventually succumbed to the nightmares, passing away a few years after the war in the partially occupied village of Dvani.[3]

1 Of the origin and use of different names for the region, see, in general, Dennis Sammut and Nikola Cvetkovski, *The Georgia—South Ossetia Conflict, Confidence Building Matters* No 6 VERTIC, London, March 1996.

2 For a description of events, see Independent International Fact-Finding Mission on the Conflict in Georgia, Volume II. September 2009.

3 Dvani, a village located in the conflict zone near Samachablo, has faced significant challenges due to its geographic proximity to the Russian Federation. Approximately half of the village territory, including the lands owned by my maternal grandparents, has been occupied by Russian forces. These occupied lands, which constituted the most fertile and productive part of the village, were once cultivated for crops such as wheat, potatoes, beetroot, and apples, sustaining half of the village's population. Despite the outbreak of the 2008 war, my maternal grandparents chose to remain in Dvani. Unfortunately, the presence of Russian troops led to the distressing situation of looting and pillaging of local homes, prompting my grandfather to take action to protect their neighbors' belongings. Night after night, my grandparents courageously transported valuable items and stored them in ►►

The threads of my family's narrative intertwined with those of countless others in a tapestry woven with pain and loss. We learned that others among our extended family had been temporarily relocated to Tbilisi into an accommodation facility for internally displaced persons. This fleeting moment of relief gave way to a heart-wrenching revelation – my mother's uncle, had fallen into the clutches of Russian forces. Unyielding in his resolve to remain in his homeland as the rest of the family fled, he stood as the district's final sentinel. His defiance invited a brutal end. The Russian occupiers, encroaching upon his home, seized him and placed him outside. There, tied to a chair, he witnessed the incineration of his two homes, the flames licking away his cherished memories. He departed this world in that very chair, broken-hearted. He was laid to rest by his former neighbours and countrymen, his final resting place shrouded in secrecy. However, this story of grief and displacement transcends the confines of my family. It is a shared narrative etched into the lives of hundreds of thousands of Georgians who, like us, lost not only family members but also homes, culture, religious sanctuaries, and the very soil that bore witness to their existence.

From that moment onward, and even prior, the insidious encroachment of occupation has woven itself into the fabric of everyday life for the people of Georgia. The Russian-forged barbed wire of de facto borders relentlessly inches forward, violently annexing more and more Georgian land. In the face of the unyielding fear propagated by Russian forces, the Georgian populace stands resilient, resolute in their determination to safeguard their native land, their essence, their faith, and their very souls. After enduring the weight of war's tragedy on their shoulders, it feels that it is one of the greatest injustices that it required a full-scale war and dehumanization of the Ukrainian people before these concerns over the impact of Russian imperialism in Georgia could be seen by the international community. What Ukraine is experiencing now is the repetition of the Georgian experience between 1992-94 and 2008. It led to Russification, artificially created ethnic tensions, settler colonialism, and aggressive borderization, which, in the end, resulted in a full-scale war and recognition of two separatist regions of Georgia[4] by the Russian Federation[5] as independent entities.

underground cellars to safeguard them from the ravages of war. The aftermath of the 2008 war took a heavy toll on my grandfather, who fell ill as a result of the trauma he experienced during those trying times. The nightmares of the war continued to haunt him until his final days, leaving a lasting impact on his life and those around him.

4 Georgia exercises de jure control over Abkhazia and Samachablo (South Ossetia), but the Russian Federation together with the separatist de facto governments have de facto control over the occupied territories.

5 In the aftermath of the 2008 war, the Russian Federation acknowledged the self-proclaimed independence of Georgian regions Abkhazia and South Ossetia. However, the majority of the International Community maintains that Abkhazia and South Ossetia ▸▸

As these painful events unfurled, I was taking my first steps in professional life as a young lawyer working for the Georgian government. It was there and then that I first realised the extent with which international law's most foundational questions can impinge on our everyday life. Academic debates over self-determination, secession and statehood came to life in late summer as we improvised makeshift legal solutions to problems that the violent pursuit of those abstract notions had on those near and dear to us, and to the very existence of a state I was a proud citizen of. The limited promise of abstract concepts of international law has since dawned on me, for they are eternally contested. And as international law and international lawyers remain divided on what makes a state, so does the state where I grew remain divided. This work marks my attempt to overcome these divisions.

While the seeds of this dissertation germinated on Georgian soil, its focus is on the international legal instruments that are purportedly universal.[6] Therefore, I approach the past and present of international law of self-determination, secession, and statehood through a wider lens. In particular, I contextualise the use of international law's conceptual apparatus in Georgia through another long-standing quarrel on statehood, namely that of Western Sahara and Sahrawi people. Western Sahara is in many ways an example of the most traditional story of the United Nations era state-making gone wrong: a former colony permanently stuck on a list of non-self-governing territories. Georgia, then again, marks a starting point for a novel development in international law where limited recognition of secession has become a legal tool from outside to freeze internal political change – a development that has since matured in Ukraine.

1.2 The aims of the dissertation and research questions

1.2.1 The dual examination of secession, cases of Abkhazia and Western Sahara

In this dissertation, two distinct focal points are examined. Firstly, the analysis delves into the realm of international law on secession, a domain within public international law that has largely remained static since the era of decolonization and the establishment of the United Nations, a perspective aptly exemplified by the Western

remain integral parts of Georgia, where the Russian Federation exercises effective control in collaboration with the de facto separatist administrations.

6 Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 European Journal of International Law 265.

Sahara case.[7] In parallel, the study aims to unravel the intricate relationship connecting secession and statehood within the context of Georgia's persistent crisis since the dissolution of the Soviet Union. This investigation challenges the prevailing 'us' versus 'them' binary often characterizing nation-states, aiming to unearth alternative avenues for resolving protracted conflicts in post-Soviet republics. As the process of decolonization has unfolded, former colonial territories have embarked on the transformative journey toward attaining independent statehood. In navigating this trajectory, questions surrounding the emergence of new states through secession have come to the fore, spotlighting the intricate interplay of group aspirations and international legal frameworks. This dissertation delves into the multifaceted dynamics of secession in the realm of international law, unravelling the origins, ideological underpinnings, and procedural nuances that underlie the recognition of seceding entities as legitimate sovereign states.

Traditionally, international law has understood actualisation of statehood through two alternative pathways.[8] There is, on the one hand, statehood that emerges through recognition of other states.[9] Once a sufficient number of states agree to interact with an entity on an international plane as their equal that entity has passed the threshold of recognition and can be considered a state. This thesis has, however, not been particularly congruent with emergence of recognised statehood, which has led many to suggest that rather than through recognition statehood is constituted through an effective exercise of authority.[10] Western Sahara functions throughout as an example of widely recognised state that lacks effective control over its area, while Abkhazia and South Ossetia are its inverse: the control of de facto governments is effective, but there is limited recognition to them as states. In the context of secession and the pursuit of self-rule, Western Sahara and Abkhazia, Georgia present two distinct narratives, both contending with the enduring impacts of colonialism and ambitions of power.

7 Marcelo G Kohen (ed), *Secession* (Cambridge University Press 2006); Allen Buchanan, 'Theories of Secession' (1997) 26 Philosophy & Public Affairs 31; James Crawford, 'State Practice and International Law in Relation to Secession' (1999) 69 British Yearbook of International Law 85; Christopher Heath Wellman, *A Theory of Secession : The Case for Political Self-Determination* (Cambridge University Press 2005).

8 James Crawford, *The Creation of States in International Law* (2nd edn, Oxford University Press 2006).

9 Mikulas Fabry, *Recognizing States* (Oxford University Press 2010); Malbone W Graham, *The League of Nations and the Recognition of States* (University of California Press 1933).

10 For a critical interpretation of effectiveness as a condition on statehood, see Janis Grzybowski, 'To Be or Not to Be: The Ontological Predicament of State Creation in International Law' (2017) 28 European Journal of International Law 409.

The focus is placed on the subject of secession, self-determination, and statehood that I analyse through the unique experiences of Western Sahara and Abkhazia. Their claims for statehood have decidedly different genesis the former stemming from decolonisation of an overseas empire, the latter from dissolution of a land empire. The emergence of numerous new states since the 1940s can be attributed to these very processes. As such, secession has been widely perceived as sui generis right within the framework of decolonisation rather than an existing right in international law widely available to sub-statae entities seeking independence. This is due to the fact that the impact of secession is not limited to individual states and their internal affairs but reverberates throughout the entire international community through creation of a new sovereign.

Against this backdrop, this dissertation analyses inherent instability and ambiguity of secession as a means of establishing a new state. Through examining the legal and political determination of self-determination, secession, and statehood, I showcase how inherently unstable the legal institution of state creation is. To come to terms with the frailty of the legal constitution of statehood in international law, international lawyers have sought to expand the scope of legal state-making beyond effectiveness and recognition. For many, there were political entities that seemed to deserve statehood but due to political and legal intricacies of the system were unable to receive neither effective control over an area nor political recognition for their aspiration to gain such control. Thus, for the past decades international law and international lawyers have been actively looking for ways to develop an alternate standard for creation of new states, where the role of the international community would be to safeguard secession and state-making.[11]

The formation of such a standard was, in part, triggered by the end of the Cold War and the dissolution of the Soviet Union and Yugoslavia[12], and the long aftermath of these processes, which Georgia is part of. The new standards for states were forged among self-titled liberal scholars of international law and within international and regional organisations for which the new states of Central and Eastern Europe sought membership of.[13] For example, according to criteria outlined by the heads of states

11 Jure Vidmar, 'Remedial Secession in International Law: Theory and (Lack of) Practice' (2010) 6 St Antony's International Review 37; Michael P Scharf, 'Earned Sovereignty : Juridical Underpinnings' (2003) 31 Denver Journal of International Law and Policy 373.

12 Lawrence Eastwood, 'Secession: State Practice and International Law After the Dissolution of the Soviet Union and Yugoslavia' (1992) 3 Duke Journal of Comparative and International Law 299.

13 Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46; for a critique of emergent right, see, Susan Marks, 'What Has Become of the Emerging Right to Democratic Governance?' (2011) 22 European Journal of International Law 507.

of the European Communities in 1993, states willing to become a member were to have respect for freedom, democracy, rule of law, market economy, and human rights – a set of criteria reminiscent of wider liberal conditionality for statehood also on the international plane.[14] The reverse side of these criteria was the idea that a state failing to fulfil these criteria was not upholding its international responsibilities, which justified an intervention of the international community, ultimately even with military means as in NATO bombing of Yugoslavia.[15] A state falling short of the liberal standard was a failed state from which seceding was justified or even earned[16]—a remedy to oppression.

1.2.2 Research objectives and questions

A remedial standard for secession has, however, created an unfortunate precedent for it allows cynical or hypocritical uptake of international law as the Russian Federation has shown first in Georgia and more recently in Ukraine.[17] The liberal standard of human rights and rule of law has provided a smokescreen for military interventions and subsequent creation of new states.[18] A responsibility to protect human rights and the rights of minorities has been mobilised to support expansionist politics and warfare, while it has turned out to be uniquely incapable of stopping even most grievous human rights violations.[19] Thus, the liberal measure for statehood has been used to justify creation of several states with virtually no recognition due to unilaterally declared human rights violations, while it has been unable to interfere and institute a change to universally recognised apartheid politics.[20]

14 See, Presidency Conclusions, Copenhagen European Council of 21-22 June 1993.

15 United Nations General Assembly (UNGA) 2005 World Summit Outcome (2005) A/RES/60/1.

16 See in general, Michael P. Scharf, Earned Sovereignty: Juridical Underpinnings, 31 Denv. J. Int'l L. Pol'y 373, 375 (2003); Paul R Williams & Francesca Jannotti Pecci, Earned Sovereignty: Bridging the Gap Between Sovereignty and Self-Determination, 40 Stan. J. Int'l L. 347, 350 (2004).

17 Stefan Oeter, 'The Kosovo Case—an Unfortunate Precedent' (2015) 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 51.

18 Fernando Tesón, *Humanitarian Intervention : An Inquiry into Law and Morality* (2nd edn, Transnational Publishers 1996).

19 Anne Orford, 'Locating the International: Military and Monetary Interventions after the Cold War' (1997) 38 Harvard International Law Journal 443.

20 W Michael Reisman, 'Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention' (2000) 11 European Journal of International Law 3; Ralph Wilde, 'Using the Master's Tools to Dismantle the Master's House: International Law and Palestinian Liberation' (2019) 22 Palestine Yearbook of International Law 3.

The concept of secession, imbued with historical and cultural variances, serves as a pivotal gateway for groups seeking self-governance.[21] By probing the origins of secessionist movements and analysing the underlying beliefs that fuel them, this inquiry seeks to shed light on the legal and political formulation of those motivations that drive aspirations for statehood. I explore the intricate political preconditions essential for the acknowledgment of a newly emerged state on the international stage and their interplay with international legal groundwork necessary for statehood. This exploration strives to illuminate the evolving contours of international law that determine the legitimacy of secession, challenging the dichotomy between mere legality and broader notions of legitimacy. In addition to charting the ideological foundations and political prerequisites of secession, this dissertation studies the structural patterns inherent in secessionist movements. By dissecting the factors that legitimize a secession, the research aspires to offer a conceptual framework that can navigate the intricate legal landscape. This endeavour seeks to equip political actors with robust and legally sound arguments when grappling with regions or groups seeking to secede.

While prevailing scholarly discourse often characterizes secession as a contentious tool in the ongoing political disputes of rival factions, this dissertation advocates for a re-reading of secession's function.[22] Through the independent articles attached to this dissertation, I explore, first, whether there are prescriptive criteria for secession within the colonial context or outside it? If the concept employed for secession in international law is purely descriptive, are there any feasible legal avenues for peoples to claim rights of statehood? Do mushroomed international fora provide tangible means to transform international law's descriptive accounts into practicable norms for non-self-governing peoples? And ultimately, can any of these new forums adjudicate political concerns that are so central to question of statehood?

The questions most salient for this introductory chapter focus on clarifying conceptual ground, that is, how international law has traditionally conceptualised secession, self-determination, and statehood, as well as where it has derived these notions. As a corollary to these conceptual matters, I pose a series of politico-legal questions that emerge from the debates concerning these contested concepts. Does the language of rights associated with self-determination and

21 See in general, Aureliu Cristescu, The Right to Self-Determination: Historical and Current Developments on the Basis of United Nations Instruments, (E/CN.4/Sub.2/404) vol. I;

22 Jaroslav Tir, 'Domestic-Level Territorial Disputes: Conflict Management via Secession' (2006) 23 Conflict Management and Peace Science 309; Juve J Cortés Rivera, 'Creating New States: The Strategic Use of Referendums in Secession Movements' (2023) 11 Territory, Politics, Governance 140.

secession matter or are these concepts bereft of law? This question leads to a further research question, namely, what are the political preconditions for recognition of a new state? If there are such political preconditions, do they constitute a structure or a pattern that would enable classification of secessions or claims thereto to categories, and when have such patterns emerged and in response to what? And, ultimately, I ask, if recognition of such contingencies in international legal argument on secession and self-determination allow us to reassess the valence of currently dominant practices?

1.2.3 Original articles and the introduction

This dissertation consists of an introductory chapter and three independent research articles. While they all answer the outlined research questions, each part of the dissertation approach the questions from a different vantage point. Each article focuses on a single aspect of secession, self-determination, and statehood in a concrete setting, whereas the introduction provides a more general exposition of these three concepts. Although the introductory chapter precedes the research articles, the articles predate introduction both temporally and in terms of research. This introduction summarises the findings of the research articles, but also expands on them to provide a more refined interpretation of the role of secession in international law.

The first research article titled “Waiting for Abkhazia: Secession and Borders as International Legal Instruments in Contested Sovereignty” delves into the intricate territorial disputes concerning Abkhazia's quest for sovereignty, approaching them through the lens of secession. The investigation spans the evolution of secession-related legal principles, ranging from the early 20th century to contemporary times, all aimed at contextualising Abkhazia's secessionist aspirations from Georgia within the established frameworks of international law. As the analysis unfolds, it becomes apparent that Abkhazia, along with analogous scenarios in several former Soviet Republics, diverges from conventional models of recognised legal and legitimate secession. Instead, these cases present a sui generis form of de facto secession, uniquely tailored to their circumstances. This form of de facto secession underscores a shared tragic experience among people throughout the area. This distinct modality of de facto secession has perpetuated an internecine state of instability for secessionist regions within the post-Soviet sphere, engendering an unceasing flux of uncertainty.

The article delves into the intricate dynamics of secession by examining the interplay between secession and borders, following a two-tiered theoretical examination. The first tier introduces three paradigmatic models of secession prevalent within international law—colonialism, earned sovereignty, and the

denial of sovereignty. Delving into these paradigms achieves a more nuanced understanding of Abkhazia's status. This exploration finds its foundation within the framework of international relations literature, particularly theories designed to comprehend borders at a macro level, especially within regions of frozen conflict.

These theories function as a prism through which the role of international law and its discourse concerning Abkhazia are critically examined. The article posits that borders transcend being mere geographic delineations or historical depictions; they embody a tangible collective of individuals who carry the weight of these boundaries. The presence of these borders on the global stage is intricately linked to the existence of an ideational border. Employing a postmodernist perspective, this exploration of borders serves as a cornerstone for assessing the narratives and discourses encompassing Abkhazia's status, both within Georgia and beyond its borders.

This article offers a multi-faceted examination of secession—particularly within the context of Abkhazia's claims to sovereignty—by dissecting established paradigms of secession and employing theories drawn from international relations literature. Through this analysis, the intricate interplay between international law, borders, and the Abkhazian situation is illuminated. The understanding that borders encompass not only geographical constructs but also embody ideational and tangible elements contributes to a more holistic understanding of the complex circumstances faced by secessionist regions. Additionally, adopting a discourse focused perspective facilitates the evaluation of narratives and discourses shaping Abkhazia's position within and beyond the confines of Georgia.

The second article, "Sovereignty in the era of fragmentation: EU trade agreements and the notion of statehood in international law", delves into the theme of sovereignty within the fragmented landscape of international law. It examines how the sovereignty of states can be relativised not only by the political influence of other nations but also by exposure to diverse, functionally distinct legal domains. The article's central inquiry revolves around the question of whether trade agreements, as instruments of international trade law, can serve as platforms for addressing the sovereignty of sub-state entities that lack representation in traditional international arenas. The analysis commences with an examination of a ruling by the Court of Justice of the European Union, focusing on the status of Western Sahara within the context of the EU-Morocco trade agreement[23]. Subsequently, it explores the potential repercussions the ruling has to the situation

[23] Case T-512/12, Front Polisario v. Council of the European Union, ECLI:EU:T:2015:953 (Dec. 10, 2015); Case C-104/16 P, Council v. Front Polisario, ECLI:EU:C:2016:973 (Feb. 19, 2016).

of Abkhazia within Georgia in relation to the EU-Georgia Association Agreement.[24]

The article highlights how trade agreements can exert both positive and negative influences on state integrity, contingent upon the intricacies of the facts and the stipulations of the relevant agreement. Reflecting the fragmentation of legal paradigms, trade agreements possess the potential to grant sub-state entities the opportunity to establish standing before regional courts, such as the Court of Justice of the European Union, or other international tribunals. This avenue might empower these entities to reinforce their claims for self-determination within the framework of international law. Beyond the theoretical implications regarding the relativity of sovereignty, the findings prompt careful consideration of the formulation and conclusion of regional and global agreements across diverse legal domains.

The third research article, "State Recognition and the Case of Western Sahara: Past Experiences, Future Lessons", is about the role of recognition in making states. The core underpinning of international law is the state, although the process of determining the emergence of a new state lacks definitive rules. While the criteria for statehood have been established since the 1933 Montevideo Convention,[25] challenges persist in recognising these criteria within existing entities. In recent times, recognition has gained heightened importance due to the actions of the Russian Federation in relation to certain Ukrainian regions. However, recognition-related issues extend beyond this context.

This article delves into the intricacies of recognition by investigating the recognition practices concerning Western Sahara, a case that has spanned five decades. The varying approaches to recognition taken by the UN, the US, and the EU offer insights into the contested nature of recognition within international law. Additionally, these diverse paths to recognition shed light on the appropriation of the law of recognition to advance specific agendas, rather than the abandonment of international law as a framework for comprehending state emergence through recognition.

By analysing the complex landscape of recognition, the article unravels the nuanced dynamics surrounding the road to recognition for Western Sahara. The

24 Council Decision 2014/494, Signing on behalf of the European Union, and Provisional Application of the Association Agreement Between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2014 O.J. (L 261) 1. Council Decision 2016/838, Concluding on Behalf of the European Union, of the Association Agreement Between the European Union and the European Atomic Energy Community and their Member States, of the one part, and Georgia, of the other part, 2016 O.J. (L 141) 26.

25 League of Nations, Montevideo Convention on Rights and Duties of States, December 26, 1933, L.N.T.S. 3802.

examination underscores the multifaceted nature of recognition as a mechanism through which states pursue their strategic interests. This multidimensional perspective reveals that recognition is a malleable tool that states employ to further their goals, thus shaping the discourse and interpretation of international law. Through this exploration, the article contributes to a comprehensive understanding of recognition's role in the intricate domain of international law, unravelling the complex interplay between emerging states and the recognition processes orchestrated by influential actors on the global stage.

1.3 Methodology

There are many ways to approach international law.[26] The method chosen for the present study sees international law as a social practice that is elaborated and maintained through discourse.[27] It is a method, which foregrounds the words of international lawyers over the objects of international law. According to the chosen methodology, it is arguably true that international law does have very real material effects, yet the development and understanding of its central concepts, such as statehood, remain at arm's length from such materiality. As such, I make throughout the dissertation a distinction between the concept of international law and its material referent. For the most part, when I refer to a state it does not refer to what it connotes in everyday parlance as a shorthand of a place one can visit, say, Georgia. Instead, it refers to a long-standing debate international lawyers have entertained over the concept of state and statehood. Therefore, the focus is less on, for example, a material border mark and more on the concept or the idea of border. The choice does not imply that the former would be of lesser importance to international law or that it would be subject to less international law.[28]

Although there is a common methodology in use throughout, the discourses chosen are different in each research article. The three independent research articles

[26] Samantha Besson and John Tasioulas (eds), *The Philosophy of International Law* (Oxford University Press 2010); Andrea Bianchi, *International Law Theories* (Oxford University Press 2017).

[27] Of such an understanding of international law, see, for example, Martti Koskenniemi, *From Apology to Utopia* (Cambridge University Press 2006); Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (Cambridge University Press 2002); Martti Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power, 1300-1870* (Cambridge University Press 2021); for an analysis of humanitarian intervention using Koskenniemi's discoursive approach, see, Gustavo Gozzi, 'The "Discourse" of International Law and Humanitarian Intervention' (2017) 30 Ratio Juris 186.

[28] Of the abundance of such law, see Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018).

each provide a way of seeing state, self-determination, and secession that is proper of international law.[29] The first research article approaches the question as a historical narrative, the second as an economical one, and the third as one of professional ideology. Inasmuch as the articles focus on these themes in relative isolation, the broader discussion on statehood, secession, and self-determination entertains all these different discourses simultaneously, denying them decisive power in questions on secession. This introduction provides a more holistic account of these discourses and posits that they constitute simultaneously existing, overlapping discourses on statehood.

In the first research article, I observe historical emergence of secessionist claims in Abkhazia. If, as some international lawyers claim, history provides a justification for demands over an area and establishment of a unity of people, there are obvious reasons to explore history.[30] There are, however, limitations to such historical justifications for territorial claims, as indicated in the article. When does relevant history begin for secessionist claims? How do we establish the continuity of people at present and the people in the past?[31] As there is no readily available answer to these questions, claims for a historical justification of a secession or statehood appear suspect or, at the very least, contestable. While study of the past can transform the work international law does in the present, the historical narratives employed in contexts of secession seldom do.[32] There is little new international law found but rather differently voiced old one resurfacing. At the same time, I indicate how control over histories has enabled a resurgence of Russian imperialism in and around the areas of the globe where it used to be able to dictate histories during the Soviet era and before.

The second article's methodological lens focuses on economy. Where the question over history is centrally concerned with making of people and their claims over territory, the question of economy has revolved around concerns over the effectiveness of control. But as indicated in the second article, economy is a much broader narrative and not solely constrained to statehood, secession, and self-

29 Ways of seeing like a state, see, for example, James C Scott, *Seeing like a State: How Certain Schemes to Improve the Human Condition Have Failed* (Yale University Press 1998). Within the framework of international law, Fleur Johns, 'From Planning to Prototypes: New Ways of Seeing Like a State' (2019) 82 Modern Law Review 833.

30 Lea Brilmayer, 'Secession and Self-Determination: A Territorial Interpretation' (1991) 16 Yale Journal of International Law 177.

31 Of illusions of the persistence of the figure and person of a state, see in general, Ernst Kantorowicz, *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton University Press 2016).

32 See in general, Anne Orford, *International Law and the Politics of History* (Cambridge University Press 2021).

determination. Using the example of Western Sahara, the article shows that economy allows for the expansion of forums and narratives where claims for statehood are raised. But as the case of Western Sahara also indicates, the mere fact of being heard and having more forums to advance the narrative of self-determination and statehood is not enough. The methodological focus on discourses also illustrates the limitations that more material accounts of statehood might have as material elements of international law (fish oil in case of Western Sahara) provide only a vector through which discursive claims for statehood and self-determination can be launched. On the other hand, the standing gained through material objects indicates that international law and its numerous tribunals might provide untold ways for demands of self-determination to be heard.

In the third article, the methodological focus turns to the professional ideology of international lawyers, and the construction of statehood through either effectiveness or recognition. The discourses explored belong to international lawyers and to states. The article addresses the inherent multiplicity of discourses international law can simultaneously entertain over the same factual circumstances. Looking at the state responses to recognition of Western Sahara, the focus on narratives underlines how the social construction of statehood can generate geographic locales with overlapping worlds that are unseen by others. Where the United Nations sees people seeking self-determination, the United States sees people best represented by Morocco, and the European Union sees people having interests that can be managed by Morocco. They all, in their different ways, fail to see the Sahrawi people as they are.

It is this larger theme of disregarding, and concomitant overlap of legal worlds that methodologically guides this introduction.[33] For example, in Abkhazia there are, living side-by-side, the largely seen world of laws and rules stipulated by the Tbilisi government and the unseen rules set by the de facto government. While international law disregards the latter, they are the only rules in existence for those currently living in Abkhazia. The breach of these unseen norms is made impossible to those living in Abkhazia, wherefore they are true only to those able to live transnational life, such as, tourists who visit in the area governed by the de facto Abkhazian government and in the area governed by the Tbilisi government. This overlap of partly unseen rules is paired with overlap of history and overlap of economy, each dismissal leading to different normative outcomes.

[33] Alex Green, 'Towards an Impossible Polis : Legal Imagination and State Continuity' in Alex Green, Mitchell Travis and Kieran Tranter (eds), *Cultural Legal Studies of Science Fiction* (Routledge 2024); Douglas Guilfoyle, 'Reading The City and the City as an International Lawyer: Reflections on Territoriality, Jurisdiction and Transnationality' (2016) 4 London review of international law 195.

As argued in the conclusion of the first research article, there is inherent sadness in this unseeing. Like Godot in Samuel Beckett's play, it is unlikely that under the present constitution of international law, there will ever be ways of seeing what we are conditioned not to see or understand. The normative worlds construed through alternate narratives will always remain beyond our grasp for as long as we fail to come in terms with what we refuse to contemplate. But like in Beckett's play, there is hope. To learn to see not through imposition of our own narrative register as the only correct way of seeing, but by lifting the veil of shared unseen from which we remain silent, provides a powerful way of transition, as is argued in the conclusion of this introduction.

The methodological choice reflects the wider theoretical approach with which this research has an affinity. This theoretical approach has carried a wide range of monikers since its inception in the 1980s, but it is one that shall be labelled a critical approach to international law within the context of this dissertation.[34] This approach shares an affinity to perceive law construed by discursive means. As indicated early on in the work of David Kennedy and Martti Koskenniemi, international legal language as a discourse is indeterminate and mutable to serve simultaneous, mutually exclusive positions.[35] It is international law's indeterminacy that bars access to a single correct normative answer, whether in questions concerning self-determination and secession, or in any area of international law. But as Koskenniemi argues, there is a professional consensus that stems from embedded preferences of international lawyers, hiding the indeterminacy, and consolidating a (conservative) consensus.[36]

1.4 Structure of the introductory essay

The indeterminacy espoused by critical international law is reflective of the way international law on self-determination and secession actively unsees some of the contingent choices international law and international lawyers perceive as falsely necessary in questions concerning statehood.[37] By challenging some of the uses of

34 See, for example, Jeffrey Dunoff, 'Critical Approaches to International Law', *International Legal Theory* (Cambridge University Press 2022); José María Beneyto and others (eds), *New Approaches to International Law : The European and the American Experiences* (TMC Asser Press 2012).

35 David Kennedy, *International Legal Structures* (Nomos 1987); Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006).

36 Martti Koskenniemi, 'Letter to the Editors of the Symposium' (1999) 93 American Journal of International Law 351.

37 On false necessity, see Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy. 1, Politics, a Work in Constructive Social Theory* (Cambridge University Press 1987).

history, economy, and professional ideology in international law, I seek to elucidate such contingencies. Thus, the methodology chosen for this research is indebted to critical international law scholars' vision on how law upholds the status quo, while being mindful of the criticism that has been targeted towards critical international law scholarship especially by feminist,[38] TWAIL,[39] and Marxist scholars[40]. International law is more than ideas and narratives and reducing it to them risks veering towards false sense of commonly shared international law, or a singular vision of international lawyers.[41] It is partly with aid of such criticism towards the critical approaches that I seek to understand the specificity of secession in the region surrounding Russia.

This introduction proceeds to provide an account of secession as it is and has been perceived in international law. The exposition of secession advances in chronological order to highlight the diversity of legal secessions that international law has recognised in the past as well as to indicate legal avenues that have been closed. The timeline is divided into three periods: pre-decolonisation, decolonisation, and post-Cold War. International law's account of secession reveals two distinct modalities for secession: statehood emerging from dissolution of overseas Empires (decolonisation) and other forms of secession. These divergent modalities are explored more in detail through a close reading of the cases of Western Sahara and Abkhazia. The introduction concludes with a vision for secession that would transcend secession's bifurcation between 'us' and 'them'.

38 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

39 Balakrishnan Rajagopal, *International Law from below : Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003); Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); James Thuo Gathii, 'Promise of International Law: A Third World View (Including a TWAIL Bibliography 1996–2019 as an Appendix)' (2020) 114 American Society of International Law. Proceedings of the Annual Meeting 165.

40 Of all three together, BS Chimni, *International Law and World Order : A Critique of Contemporary Approaches* (2nd edn, Cambridge University Press 2017). For Marxism in international law, see, for example, China Mieville, *Between Equal Rights* (Brill 2004); Susan Marks (ed), *International Law on the Left* (Cambridge University Press 2008).

41 Lauri Malksoo, *Russian Approaches to International Law* (Oxford University Press 2015); Anthea Roberts, *Is International Law International?* (Oxford University Press 2017).

2 Decolonization, Secession, and the Emergence of New States: A Theoretical Framework

2.1 Secession

> "*We can clearly see that judicial universalism on which the United Nations were founded is an attempt to legalize and reconcile international politics but ends up being little more than a manifestation of the desire for humanistic rationalization in the global age, desire to believe in the theory of human rights and the equality of sovereign states (which maintain their phantasmal existence only within the United Nations). Thus, this judicial universalism does not depart from the modern nexus-completely ineffective today-between individualism, statism, and universalism.*[42]"

The political cartography of the international community at present is dominated by internationally recognised, independent nation-states.[43] States are omnipresent and their number has steadily increased from a group of a few dozen to some two hundred. Yet, this dominant form of political community is a relatively recent arrival. Human communities have splintered and fused since time immemorial, but secession – creation of a new state by the withdrawal of a territory and its population, where that territory was previously part of an existing state[44] – is a phenomenon that has emerged together with a nation state. Whether the revolutions that led to the creation of an independent United States and Haiti were some of the first modern secessions that provided a model to later practice or if they were the last of the old secessions is beside the point of the present thesis, but it is around the end of the 18th century

42 Carlo Galli, 'Carl Schmitt and the Global Age' (2010) 10 CR: The New Centennial Review 1.

43 For the emergence of states, see, Natasha Wheatley, *The Life and Death of States: Central Europe and the Transformation of Modern Sovereignty* (Princeton University Press 2023).

44 Aleksandar Pavković and Peter Radan, *Creating New States* (Ashgate 2007) 7.

secession also emerges as an (international) legal question. And already then, there is a colour line – a bifurcation drawn between communities of colour seeking independence and a white settler community doing so.

These early secessionist examples, especially the recognition of the United States by the international community, provided a precedent for assessment of later secessionism. Central was gaining the control over the area, and, ultimately, gaining acceptance of the former parent state. For as long as these conditions were fulfilled, asking for other states to 'recognise' a state was considered an absurdity.[45] A state entered the international community by acting within the international community unchallenged. But the conditions of entry to the international community were notably different with the black slave community of Haiti. As a condition for Haiti's recognition, it had to compensate former slave owners for the loss of their property in slaves, for an amount that was 'five times France's total annual budget and ten times as much as the United States paid Napoleon for the Louisiana Purchase'.[46] Effective control was not enough if others refused to recognise such control. Haiti bought recognition in the shadow of the French gunboats.

These early examples of secession highlight lasting features. On the one hand, both the United States and Haiti had what modern nomenclature would call *effectiveness* regarding their control. They both had control over the area and a capable government to take care of their internal and external relations. On the other hand, they both gained *recognition* for the statehood from the international community, which consolidated their separation from the past parent state and their emergence as a new, independent nation-state. Also, other latent elements of more contemporary secessionism are on display here. First, both are overseas to their parent state. There is little geographical continuity between newly found states and their former parent states. A sea or a country in between the seceding state and the parent state has been an element of most recognised secessions up to the present. Second, there is a difference between a secession and a secession that cannot be explained by legal norms if those norms are presumed to apply universally. There is an element of politics that is not easily reducible to any precise norms. It has made for inconsistent outcomes for secessionism.

45 CH Alexandrowicz, 'The Theory of Recognition "in Fieri"' (1958) 34 British yearbook of international law 176, 182.

46 Liliana Obregón, 'Empire, Racial Capitalism and International Law: The Case of Manumitted Haiti and the Recognition Debt' (2018) 31 Leiden Journal of International Law 597, 610.

2.1.1 Woodrow Wilson's approach on self-determination and the colonial context of secession

Legally, secession gained a newfound provenance at around the time of the end of First World War in a contest between different visions – liberal and socialist – for internationalism that both, at the time, succumbed to imperialism.[47] The liberal vision of national self-determination associated with Woodrow Wilson, the social to Vladimir Lenin. They both marked a radical departure from European imperialism that justified domination through Europe's civilizing mission, but Wilson's and Lenin's visions stressed different ideals. Rita Augestad Knudsen summarises the differences between Wilson and Lenin as follows:

> *Lenin's earlier discourse of self-determination had primarily denounced domination, dependence and inequality, as well as interference with peoples in the forms of capitalist and imperialist oppression and exploitation. Wilson, by contrast, equated the freedom of 'free nations' […] with their peace and unencumbered trade*.[48]

While both visions of self-determination opposed domination, they opposed it for different reasons and to different extents.

At around the time of the Paris Peace Conference, President Woodrow Wilson introduced his ideas for the concept of self-determination, advocating the right of all peoples, including those in colonies, to determine their political future according to their own will.[49] This idea promised recognition of numerous new states, representing a significant departure from the previous perception of colonial peoples and territories as dependent on European guidance.[50] However, the process

47 Deborah Whitehall, 'A Rival History of Self-Determination' (2016) 27 European Journal of International Law 719.

48 Rita Augestad Knudsen, *The Fight Over Freedom in 20th and 21st-Century International Discourse* (Palgrave Macmillan 2020) 70.

49 11 February 1918: President Wilson's Address to Congress, Analyzing German and Austrian Peace Utterances, <www.gwpda.org/1918/wilpeace.html?fbclid=IwAR2W_4TGJsIqDrgCuE5WPzmqgfmWVz36LXo0zxHWMJ7zzjd6JlIf0dkFT2s>, visited on 12 October 2023.

50 Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge University Press 1995) 19; Harold William Vazeille Temperley, *A History of the Peace Conference of Paris: The Settlement with Germany* (Frowde and Hodder & Stoughton 1920); Thomas D Musgrave, *Self-Determination and National Minorities* (Oxford University Press 2000); Anthony Whelan, 'Wilsonian Self-Determination and the Versailles Settlement' (1994) 43 International and Comparative Law Quarterly 99; Michla Pomerance, 'The United States and Self-Determination: Perspectives on the Wilsonian Conception' (1976) 70 American Journal of International Law 1.

of recognition encountered challenges and delays, as Wilson's doctrine lacked adequate domestic support and a concrete implementation plan. Some viewed self-determination as a potentially destabilizing force.[51] As his Secretary of State at the time argued, 'Without a definite unit which is practical, application of this principle is dangerous to peace and stability. […] The phrase is simply loaded with dynamite.'[52]

The echoes of Wilson's voice reverberated through the post-World War I era, notably during the peace negotiations. His emphasis on the principle of "consent of the governed" held profound significance, particularly for nationalities ensnared under foreign rule. For these groups, Wilson's declarations were perceived as a beacon, guiding their aspirations as negotiations loomed. However, their interpretation of his words diverged from representative government, focusing instead on their personalised understanding of self-determination – the birth right of ethnic groups to forge their own sovereign nation-states. Wilson's vision encompassed the rights of well-defined national elements to pursue self-determination, an idea that kindled hope within those struggling under colonial dominion.[53]

While Wilson's words sparked an intense resonance, particularly in the hearts of those dwelling in colonial territories, embodying the promise of self-governance and illuminating a path to autonomous decision-making. However, the aftermath of the Paris Peace Conference produced a different outcome from the anticipated decolonisation. Within Europe, the disruptive effects of self-determination were defused through protection of minorities, whereas the colonial territories of Germany and the Ottoman Empire were rebranded as Mandate Territories, and the grip of dependency was enforced with even greater vigour. The establishment of the League of Nations in 1920[54] introduced the Mandate System, placing upon Mandatories – advanced nations aspiring to "civilize" the colonised – the responsibility for the well-being and development of colonial peoples.[55]

The League Covenant presented the civilization of the colonized as a sacred duty, a responsibility that the mandates had to uphold on behalf of the League of Nations. The Mandate System had the intention of guiding dependent nations towards eventual self-governance, although they continued to be seen as subordinate to their European counterparts. The categorisation of mandates into A, B, and C established

51 Pomerance (n 50) 2; Jan Klabbers, 'The Right to Be Taken Seriously: Self-Determination in International Law' [2006] Human Rights Quarterly 186.

52 Robert Lansing, *The Peace Negotiations: A Personal Narrative* (Houghton Mifflin 1921) 86.

53 Cassese (n 50).

54 League of Nations, Covenant of the League of Nations, 28 April 1919, available at: https://www.refworld.org/docid/3dd8b9854.html [accessed 15 November 2023]

55 Mark Mazower, *Governing the World : The History of an Idea* (Allen Lane 2012).

a hierarchy of statehood based on developmental criteria, reinforcing a structured arrangement. While resembling colonies in some respects, mandates often had differing conditions. Carefully detailed agreements between mandates and mandate territories outlined specific duties and obligations. The Permanent Mandates Commission was tasked with overseeing these agreements. Despite these mechanisms, the Mandate System did not consistently amplify the voices of all colonized peoples or fully acknowledge their right to complete independence.[56] Nevertheless, amid the intricacies of this system, Iraq's attainment of independence from the United Kingdom in 1932 served as a prime example of self-governance and progress.[57] This case illustrated that although the journey was challenging, the destination was possible, reaffirming the potential of self-determination even within the confines of the Mandate System.[58]

2.1.2 Vladimir Lenin's approach on secession

In comparison to legally and institutionally compromised Wilsonian self-determination, the ideas espoused and partly codified by Vladimir Lenin appeared much more transformative. Lenin wrote in 1913 that his vision for self-determination entailed a right to secede, which was later codified on the constitutional level of most socialist countries.[59] According to Lenin, self-determination encompassed the entitlement of each nation to determine its state allegiance, as well as its internal political, economic, social, and cultural affairs. Lenin's analysis focused on three key dimensions of self-determination: its application in allowing ethnic or national groups to shape their destiny, its role as a guiding principle for territorial allocation post-conflicts, and its utilization as an anti-colonial principle for emancipating colonial nations.[60] Lenin's stance was that self-determination should predominantly manifest through secession.[61] Nonetheless, he underscored that secession must arise

56 Anghie (n 39).

57 See, in general for the process, Susan Pedersen, 'Getting out of Iraq-in 1932: The League of Nations and the Road to Normative Statehood' (2010) 115 American Historical Review 975.

58 Of concessions made to gain this independence, see ICJ, *Anglo-Iranian Oil Co.* (United Kingdom v. Iran).

59 Stanley Page, 'Lenin and Self-Determination' (1950) 28 The Slavonic and East European Review 342.

60 Vladimir Ilich Lenin, 'Draft Theses on National and Colonial Questions for the Second Congress of the Communist International' [1920] Lenin's Collected Works 144–151; Vladimir Illich Lenin, 'The Revolutionary Proletariat and the Right of Nations to Self-Determination' (1915) 21 Collected Works 407.

61 Lenin, 'Draft Theses on National and Colonial Questions for the Second Congress of the Communist International' (n 60).

from a democratic expression of the populace's will, eschewing coercive measures. In instances involving territorial adjustments, self-determination could be executed through mechanisms like plebiscites or referendums. Furthermore, colonised communities held the right to employ armed resistance in pursuing self-determination, implying political autonomy and international recognition.[62]

Notwithstanding his advocacy for self-determination, Lenin did not view the achievement of national or communal independence as the ultimate objective. He cautioned against the potential pitfalls division, fragmentation, and formation of diminutive states would pose, while highlighting the benefits of larger states and federations. While no one should be subject to colonial domination, Lenin argued, for the workers living in the new-found states liberated from imperialism, workers' federation under one banner would benefit their class cause. Due partly to the staunch criticism of the state form by Marx, Lenin saw self-determination and state-formation only as stepping stones towards the future union and the upcoming internationalism of socialist. He also held a strong belief that once independent, the oppressed minorities and colonies would join the newly formed Soviet Union of their own free wills. Thus, self-determination only served as a way to break the shackles of capitalist oppression.[63]

This duality of Lenin's advocacy for secession and self-determination was warped in the actual policies of the Soviet Union. After an initial wave of independence for many regions of the former Russian empire in the aftermath of the events of 1917, as the Bolshevik's managed to consolidate their power, the Soviet Union started a gradual expansion through military means. Even in the first instance, the Bolsheviks held the power to determine the feasibility of establishing new states, creating a varied landscape where secession for some regions, such as Finland, was relatively uncomplicated, while challenging elsewhere, such as in Georgia. And while Soviet interference in the Finnish Civil War of 1918 and throughout the first years of Finland's independence remained modest, the First Georgian Republic was greeted with greater hostility, leading eventually to military occupation and overthrow of its government in 1921.[64]

The right to secede that was recognised as part of the Soviet Constitution was equally illusory as the respect for self-government. Throughout the existence of the

62 Frank Przetacznik, 'The Basic Collective Human Right To Self-Determination of Peoples and Nations as a Prerequisite for Peace' (1990) 8 New York Law School Journal of Human Rights 49, 53.

63 Lenin, 'The Revolutionary Proletariat and the Right of Nations to Self-Determination' (n 60).

64 V. I. Lenin, Finland and Russia, Pravda No. 46, May 15 (2), 1917. Published according to the text in Pravda. (*Lenin Collected Works*, Progress Publishers, 1964, Moscow, Volume 24, pages 335-338.)

Soviet Union, all opposition movements were quelled with force rather than embraced as signs of desire to self-govern. As such, Lenin's formulation of self-determination and, ultimately, a right to secede was in equal measures as illusory as that of Wilson's. The realpolitik, the disruptive force of the idea, or the belief that those under colonial or other imperial control were incapable of governing themselves neutralised self-determination for the whole interwar era.

2.1.3 Montevideo Convention on the Rights and Duties of the States

Despite self-determination and secession suffering a setback, the idea of statehood itself was consolidated during the interwar period. In 1933, the American states signed the Montevideo Convention on the Rights and Duties of States.[65] In its first article, the Convention provides a formal definition of a state that has since gained the status of customary international law. The article provides four criteria for statehood: a permanent population, a defined territory, government, and capacity to enter relations with other states.[66] The Convention marked a radical departure from the old by denouncing the importance of recognition (art. 3) and by denouncing the unequal status of states (art. 4). As such, the Convention made effectiveness of control and of government the sole defining character of a state, removing the decisive role of the parent state's willingness for emergence of a new state. Whether wanted or unwanted, an effective government over an area with a permanent population makes a state.[67]

The interwar period then marks a twofold rupture with the past. On the ideological level, the period sees liberal internationalism embracing self-determination as a response to the vision of socialist internationalism. Even though both Wilson's and Lenin's forms of self-determination were unable to introduce a change, the idea or dream of independence they promised lived on. On a more normative key, the Montevideo Convention formalised statehood and, at the same time, removed reference to civilization as a factor. All states were equal, and every effectively governed area had a right to be called a state. But it was only the Second World War and its aftermath that brought these changes to fruition.

65 League of Nations, Montevideo Convention on Rights and Duties of States, December 26, 1933, L.N.T.S. 3802.

66 Martin Dixon, *Textbook on International Law* (7th edn, Oxford University Press 2013); Crawford (n 8).

67 Charlesworth and Chinkin (n 38); Martin Clark, 'A Conceptual History of Recognition in British International Legal Thought' (2017) 87 British Yearbook of International Law 18; Martti Koskenniemi, 'What Is International Law For?' in Malcolm D Evans (ed), *International Law* (3rd ed., Oxford University Press, USA 2010).

3 Two Narratives on Secession

3.1 Colonial narrative

In August 1941, wartime leaders of the United States and the United Kingdom concluded a Charter outlining their joint goals and aspirations for the future international order once the war ceased. The third paragraph of this Atlantic Charter[68] states that:

> *[The United States and the United Kingdom] respect the right of all peoples to choose the form of government under which they will live; and they wish to see sovereign rights and self-government restored to those who have been forcibly deprived of them.*

The leaders of the Allied forces based 'their hopes for a better future of the world' yet again on an idea of self-determination, as Woodrow Wilson had done after the First World War. Akin to Wilson's calls for self-determination, the Atlantic Charter made the lives of those who had to apply the articulated policies more complicated and the rights of colonial people no less illusory.[69]

At the end of the Second World War, the world lay in ruins. Where Woodrow Wilson had failed to lead the United States to League of Nations membership, Harry Truman's U.S. chose internationalism over isolationism.[70] And the Atlantic Charter that had guided the vision of the Allied forces during the War was consolidated as part of the new world order in the Charter of the United Nations. The solemn declaration of the UN Charter in its first article states that the purpose of the United Nations is '[t]o develop friendly relations among nations based on respect for the

68 *The Atlantic Charter*, 1943. [Washington, D.C.: U.S. Government Printing Office].

69 Mark Willis, 'Undermining Self-Determination: Robert Murphy and the Atlantic Charter in Tunisia, 1943' (2012) 17 Journal of North African Studies 595; Bonny Ibhawoh, 'Testing the Atlantic Charter: Linking Anticolonialism, Self-Determination and Universal Human Rights' (2014) 18 International Journal of Human Rights 842.

70 Elizabeth Spalding and Daniel Margolies, 'The Truman Doctrine', *A Companion to Harry S. Truman* (Wiley-Blackwell 2012).

principle of equal rights and self-determination of peoples'.[71] The principle of self-determination was, as forcibly argued during the negotiations of the Charter, the liberal version promoted by Wilson, and it did not entail the right of secession.[72]

Yet, there were substantive changes to the status of colonies emanating from the proclaimed principle of self-determination. The replacement of the Mandate System[73] with the Trusteeship System saw the establishment of a roster of non-self-governing territories,[74] with the express objective of advancing them toward self-rule and autonomy. Despite clear alignment with the purported goal of the Allied leaders, the Trusteeship System suffered from similar institutional deficiencies as the Mandate System before. While some of the former Mandates directly received their statehood and others were placed on the list of non-self-governing territories, the Mandate System itself outlasted the League of Nations by more than two decades.[75] The institutional weaknesses of the Trusteeship System were clearly on display in the case of South West Africa (Namibia), which occupied the International Court of Justice from the 1950s to 1970s.[76] The Court found, inter alia, that while the Trusteeship System provided a suitable solution for the problem, South Africa as a Mandatory had no obligation to place South West Africa under the list, leading to no international institutional supervision of the area for decades, and stalled self-determination of the Namibian people.[77] The continued existence of a list of non-self-governing territories is an acute reminder of how, still today, unfulfilled the promise of the Atlantic Charter is.

Even though the promise of self-determination was made by the powerful nations of the global North, the gradual move towards the realisation of this promise was guided by the leaders of colonies and former colonies. As Adom Getachew notes, '[t]he inclusion of colonies within the purview of the UN Charter marked a shift from the league,' but as 'self-determination was not referenced in relationship to either

71 U.N. Charter, 26 June 1945, article 1.

72 Documents of the United Nations Conference on International Organization, I/1/16 (vol. VI. p. 296).

73 See generally, Nele Matz, 'Civilization and the Mandate System under the League of Nations as Origin of Trusteeship' (2005) 9 Max Planck Yearbook of United Nations Law 47.

74 GA Resolution 1541 defines a non-self-governing territory as "a territory, which is geographically separate and is distinct ethnically and/or culturally from the country administering it."

75 Karen Knop, *Diversity and Self-Determination in International Law* (Cambridge University Press 2002).

76 Michla Pomerance, 'The ICJ and South West Africa (Namibia): A Retrospective Legal / Political Assessment' (1999) 12 Leiden Journal of International Law 425.

77 Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971.

non-self-governing territories or the new trusteeship system'[78] the shift was modest at best. A right to self-determination that made true the promise of the principle of self-determination embraced by the wartime leaders was 'a contested and contingent reinvention'[79] rather than an inevitable outcome of the UN Charter's language. The change in perception of self-determination from a loose principle to a right emerged through framing 'the problem of empire as one of enslavement'[80] and mobilising the then-negotiated human rights Covenants to promote the cause.

Seeing the active role of the anticolonial movement in transformation of self-determination from a principle to a right alters the understanding of self-determination and its inherent limitations as well as introduces new paradoxes to the realisation of that right. The movement that emerged already at the interwar period and gained momentum during and after the Second World War made self-determination a precondition for realisation of human rights.[81] Understanding anticolonial movement's role in transformation of self-determination from a principle to a right at international level, alters narrative still entertained widely in international law scholarship during the most recent heyday of self-determination in the 1990s. While then many argued that decolonisation was a foregone conclusion already by the 1960s, the shaping of self-determination to a (human) right by the postcolonial leaders shows the important limitations to the right of self-determination they had and were partly willing to make, for example, in the context of settler colonies.[82] These antinomies are acutely at display in most of the contested claims for self-determination even at present.

The evolution of the right of self-determination indicates how these antinomies persistent to this day emerged.[83] During the negotiations of the human rights covenants in the 1950s, the postcolonial states forcefully argued for a nexus between individual's enjoyment of human rights and dignity with peoples' right to self-determination. In the common first article of the Covenants, this is declared in absolute language – 'All peoples have the right to self-determination.' Yet, the realisation of this unconditional right remains subject to gradualism as all states 'shall *promote* the realization of the right of self-determination […] in conformity

78 Adom Getachew, *Worldmaking after Empire : The Rise and Fall of Self-Determination* (Princeton University Press 2019) 71.

79 ibid 74.

80 ibid 80.

81 Cyra Akila Choudhury, 'From Bandung 1955 to Bangladesh 1971' in Luis Eslava, Michael Fakhri and Vasuki Nesiah (eds), *Bandung, Global History, and International Law: Critical Pasts and Pending Futures* (Cambridge University Press 2017).

82 Martti Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (1994) 43 International and Comparative Law Quarterly 241.

83 See in general, Helen Quane, 'The United Nations and the Evolving Right to Self-Determination' (1998) 47 The International and comparative law quarterly 537.

with the provisions of the Charter of the United Nations.'[84] Also, the content of the right of self-determination was limited to realisation of human rights, forcing the postcolonial states 'to abandon the more radical demand of permanent sovereignty over natural resources.'[85]

A more radical vision for the right of self-determination was articulated in a General Assembly resolution 1514 (XV) on 'Declaration on the Granting of Independence to Colonial Countries and Peoples'.[86] While the Declaration retains no gradualism for realisation of the rights of dependent people to independence, it upholds the respect for 'national unity and the territorial integrity' as the cornerstones of international law. As such, it is mindful of the intricate balancing act between the disruptive effects of self-determination and the demands for the stability of the international community. Even though '[i]nadequacy of political, economic, social or educational preparedness should never serve as a pretext for delaying independence',[87] the state that emerges through the use of self-determination was a whole national unit, whose integrity should not be challenged. The borders of a postcolonial state were to be of equal permanence to those of other states.

3.1.1 Biafra-Nigeria secessionist conflict and the principle of uti possideties

In the 1960s, more and more former colonies asked and fought for and eventually gained independence. Especially in the African continent, the number of independent states grew notably as they emerged out from former colonies. Many of the new states contained within them minorities or regions that were dissatisfied being part of a new postcolonial state and voiced an independent claim for self-determination. These secessionist calls within new states had a profound impact on the development of international law in general and on the development of self-determination and secession in particular. For example, the early secessionist government of Katanga (1960-63) marked a watershed moment in transformation of the United Nations.[88] While Katangan[89] secession has been traditionally framed as an attempt to continue

84 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

85 Getachew (n 78) 91.

86 UN General Assembly Resolution 1514 (xv), 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples.

87 *Id.* at para 3.

88 Anne Orford, *International Authority and the Responsibility to Protect* (Cambridge University Press 2011).

89 See also, Colin Hendrickx, 'Tshombe's Secessionist State of Katanga: Agency against the Odds' (2021) 42 Third world quarterly 1809.

white settler domination, the secessionist demands of Biafra from Nigeria[90] more clearly illustrate the antinomies of the right of self-determination in the form that it had emerged in human rights covenants and GA resolution 1514 (XV).[91]

In October 1960, Nigeria gained independence from the United Kingdom. The borders of newly found state of Nigeria were reflective of treaties concluded by the former colonisers. These borders were not particularly reflective of any 'traditional' idea of nationalism but rather a sign of European metropoles' projection of power. The borders lay where the European powers had agreed them to be in agreements concluded for the most part by the 1930s, and these conventional titles were transferred to newly established states as borders irrespective of control over area or communal ties.[92] In Nigeria, these communal ties turned into a point of contention relatively soon after the independence. In January 1966, army officers assassinated country's political leadership and took power into the hands of military and political leaders consisting mostly of the eastern Igbo people. But already in July of the same year, a military counter-coup ousted the Igbo leadership, leading to waves of violence against Igbos especially in the Northern Region. This violence, widely narrated amongst Igbo people as genocide, played a central role in eventual claims for independence of the Igbo people and establishment of the republic of Biafra.[93]

The backdrop of ethnic and regional disparities, economic grievances, and struggles for political supremacy among Nigeria's diverse ethnic factions fomented the highly volatile environment. After the countercoup and violence against the Igbo people, the Eastern Region and its leadership voiced their mounting discontent to their perceived marginalisation. Fuelled by this discontent, the leader of the Eastern Region, Lieutenant Colonel Chukwuemeka Odumegwu Ojukwu, called for greater autonomy and self-determination to his people. In May 1967, the Eastern Region, predominantly inhabited by the Igbo people, declared the establishment of the Republic of Biafra. This proclamation set the stage for a civil war, pitting the

90 See in general, SK Panter-Brick, 'The Right to Self-Determination: Its Application to Nigeria' (1968) 44 International affairs 254.

91 UN General Assembly Resolution 1514 (xv), 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples.

92 To this effect, see, ICJ in Cameroon v Nigeria; for the claim, see *Frontier Dispute (Burkina Faso* v. *Republic of Mali),*22 December 1986, ICJ, Judgment, para. 63; See also, JG Merrills, 'Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria:: Equatorial Guinea Intervening), Merits, Judgment of 10 October 2002' (2003) 52 The International and comparative law quarterly 788.

93 Douglas Anthony, '"Ours Is a War of Survival": Biafra, Nigeria and Arguments about Genocide, 1966-70' (2014) 16 Journal of genocide research 205.

secessionist Biafran forces against the Nigerian government.[94] The Nigerian administration vehemently opposed the secession and made resolute efforts to uphold Nigeria's territorial integrity. The conflict bore witness to intense military campaigns, including blockades, aerial bombardments, ground offensives, and sieges. The Nigerian government leveraged a substantial military advantage, supplemented by international allies and superior resources, gradually eroding the strength of the Biafran forces with heavy civilian toll due to starvation.[95]

The short-lived Republic of Biafra clearly exemplifies the dilemma of the right to self-determination embodied in the GA Resolution 1514 (XV).[96] The unconditional right, on the one hand, to self-determination belongs to all peoples, and '[t]he subjection of peoples to alien subjugation […] constitutes a denial of fundamental human rights', which, through its wording, ought to also include the Igbo people. Further still, '[a]ll armed action […] against dependent peoples shall cease' while respecting 'the integrity of their national territory.' If Igbo people had an unconditional right to self-determination, then the Federal Republic of Nigeria did constitute an alien subjugation that through recourse to force violated the integrity of their national territory. On the other hand, the very same resolution calls for respect of 'the national unity and the territorial integrity of a country'. The people under alien subjugation were entitled to self-determination, but in case of the former colonies the 'alien' for many referred to overseas metropole.[97] Thus, when Igbo people were demanding for a right to self-determination, they were breaking with the national unity rather than asking for respect to the integrity of their national identity.

This interpretation of the right to self-determination was widely shared among the postcolonial scholars in Africa as well as political leaders of the era. For example, some defined self-determination as 'the right of the majority within a generally

94 M Rafiqul Islam, 'Secessionist Self-Determination: Some Lessons from Katanga, Biafra and Bangladesh' (1985) 22 Journal of Peace Research 211; MG Nayar, 'Self-Determination beyond the Colonial Context: Biafra in Retrospect' (1975) 10 Texas Journal of International Law 321; Gerry J Simpson, 'The Diffusion of Sovereignty : Self-Determination in the Post- Colonial Age' (1996) 32 Stanford Journal of International Law 255.

95 Pius Okoronkwo, 'Self-Determination and the Legality of Biafra's Secession under International Law' (2002) 25 Loyola of Los Angeles international & comparative law review 63.

96 UN General Assembly Resolution 1514 (xv), 14 December 1960, Declaration on the Granting of Independence to Colonial Countries and Peoples.

97 Ali Mazrui, *Towards a Pax Africana: A Study of Ideology and Ambition* (University of Chicago Press 1967).

accepted political unit to the exercise of power'[98] where rights of minorities would find their realisation through individual human rights. What such proposals for racial or majoritarian reading of self-determination could not answer was what should a minority whose rights are domestically trampled do. As their critics noted '[p]erhaps [these peoples], like the blacks in South Africa and Rhodesia, would have to be content with pious U.N. General Assembly Resolutions.'[99] There was no direct legal recourse to solve even gross violations of rights through secessionism. This was made clear at the time both by the Secretary-General of the United Nations U Thant and the Organization of African Unity, there was a wide-spread condemnation of secession, and demotion of secessionism within an established postcolonial state to a matter of internal affairs.[100] The function of the right to self-determination was the preservation of national unity within once established territorial boundaries – nothing more neither nothing less.

To legally overcome this apparent dilemma of self-determination, international lawyers, and eventually also international tribunals, relied on the principle of *uti possidetis juris*. The principle dictated that former colonial territories should inherit the colonial borders as their conventional title. Thus, for example with Nigeria, the borders were to be found in treaties concluded between France and England or England and Germany – ultimately in the division of Africa between the European powers in the Berlin Conference of 1884.[101] And while many former colonies have challenged these borders in disputes before the International Court of Justice, these same states have been reluctant to admit internal challenges to them. While interpretation of border treaties between states and claims over effective, if not necessarily legal, control over area have been commonplace, attempts to secede have not been perceived through the same legal lens. Yet, it is precisely the ill-conceived and arbitrary borders drawn by the European powers that created or exacerbated tensions within the boundaries of many postcolonial states, laying the foundation for a multitude of secessionist movements within these former colonial territories.

The right to self-determination of all peoples turned out to be precisely that dynamite Robert Lansing had claimed it to be with no end on sight.[102] To prevent the

98 Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (Oxford University Press 1963) 104.

99 Onyeonoro Kamanu, 'Secession and the Right of Self-Determination: An O.A.U. Dilemma' (1974) 12 The Journal of modern African studies 355, 360.

100 AHG/Res. 51 (IV).

101 Ratner R Steven, 'Drawing a Better Line : UTI Possidetis and the Borders of New States' (1996) 90 American Journal of International Law 590; Ieuan Griffiths, 'The Scramble for Africa: Inherited Political Boundaries' (1986) 152 The Geographical journal 204.

102 Lansing (n 52).

powder keg from exploding, international lawyers and postcolonial leaders used their craft to defuse its immediate threat to stability of international order. While the postcolonial states emerged as new states, they were largely seen as successor states of the entities that had existed within the same territory. This was so in terms of concession agreements, but also, and more importantly for development of international law on self-determination and secession, for the border agreements.[103] The principle of *uti possidetis juris* acted as a stopgap against perpetual division and for the stability of states in the form they had originally emerged on the international plane.[104] It might not have been an ideal solution to the legal conundrum posed by the right to self-determination as a human right, but it allowed for stability of statehood in the postcolonial world, even if it meant a heavy human price.

3.1.2 Bangladesh-Pakistan case and the friendly relations declaration

As the conflict in and the existence of Biafra was about to end, the international law on colonial self-determination and secession was about to receive its ultimate formulation. The Friendly Relations Declaration, long in the making, was adopted by the General Assembly of the United Nations in 1970.[105] The Declaration underlined the difference between a colonial and non-colonial secession by declaring that '[t]he territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it'. Thus, while the Declaration underscored the importance of territorial integrity, such territorial integrity did not exist between a metropole and a colony, wherefore a right to self-determination for peoples living in colonies did constitute a right to secede for which 'such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.' While states should abstain from interfering on internal matters of other states in the name of their sovereign equality, such limitations should not constrain aid and support to a colony using its right to self-determination.[106]

103 Matthew Craven, *The Decolonization of International Law* (Oxford University Press 2007).

104 Steven (n 101).

105 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations , 2625 (XXV), 24 October 1970.

106 Samuel Moyn and Umut Özsu, 'The Historical Origins and Setting of the Friendly Relations Declaration' in Jorge Vinuales (ed), *The UN Friendly Relations Declaration at 50* (Cambridge University Press 2020).

The language of the Declaration and its unreserved support for the rights of dependent peoples can be understood through the context of its emergence. First, by the time of the Friendly Relations Declaration, the number of colonial territories had seen a drastic reduction and most of the European metropoles had little to no colonies outside the Portuguese colonies in Africa and island states part of the British Commonwealth. This had increased the relative strength of the non-aligned countries at the United Nations and reduced the vested interests of European countries to oppose. There were few supporters of colonisation remaining, while many wanted to support the independence of the remaining dependent peoples. Second, as the Biafran conflict had shown, there was a widely shared consensus concerning territorial integrity of independent states. This called for a distinction between different forms of secessionism. A demand for right to secede in a territorially continuous state was an internal affair, whereas a demand by geographically disconnected peoples and territories was not. This difference justified the support by other states of the demands of the latter, whereas the support of the former was seen as a violation of state sovereignty.

The emergence of the state of Bangladesh holds a key role in understanding the uneasy balance between legal and supported secessionism within the colonial context and the uncalled-for secessionism outside colonialism. To understand this intricate balancing, a comparison between Biafra and Bangladesh is instructive. Bangladesh and Biafra were both parts of a territory of a postcolonial state. Bangladesh was a part of Pakistan that had gained its independence in 1947 from the United Kingdom. The partition of Indian colony was motivated by religious consideration and a concern over Hindu suppression of the dominantly Muslim population of colony's eastern and western parts.[107] Therefore, the former Indian colony was divided into two, marking a departure from the *uti possidetis juris* doctrine: India stood in the middle while Pakistan stood on both its eastern and western side without a shared land border between the two parts of the Pakistani state. While the East Pakistan – that is the present-day Bangladesh – was more populous, West Pakistan emerged as the political and economic centre, distinct from East Pakistan in geography and culture, resulting in tensions exacerbated by economic inequalities and perceived discrimination.[108]

In 1970, in the first free national elections of Pakistan, a political party called the Awami League, led by Sheikh Mujib-ur Rahman, triumphed in the national elections. The party had been calling for greater autonomy for the East Pakistan for

[107] Rafiqul Islam (n 94); Choudhury (n 81).

[108] E Wayne Nafziger and William L Richter, 'Biafra and Bangladesh: The Political Economy of Secessionist Conflict' (1976) 13 Journal of Peace Research 91; Simpson (n 94).

years, and now with a democratic mandate to fulfil its promise, it sought to do so. However, party's negotiations with the first party of West Pakistan, the Pakistani People's Party, over government were inconclusive, which left the power in the hands of the military junta led by General Yahya Khan. Khan dismissed the civilian government, which left the people in East Pakistan feeling betrayed by the politics. In response, they stormed the streets. To quell the protests, on 25 March 1971, Khan ordered a launch of a military operation to repress and silence the demands for greater autonomy of East Pakistan called for by the Awami League. The brutal military operation transformed the internal crisis of Pakistan into an international one as millions fled from East Pakistan to India. In July 1971, the Secretary-General of the United Nations in his memorandum to the President of Security Council called attention to 'the appalling and disruptive problem of caring […] for millions of refugees, whose number is still increasing'.[109]

India's response to the eruption of brutalities in East Pakistan was initially to classify it as a domestic affair, while being clearly sympathetic to the cause of East Pakistani people and their calls for autonomy[110]. The sympathy extended to providing support for the training of East Pakistan's *Mukti Bahini* fighters, while India formally refused to partake the hostilities. But as the number of refugees grew, so did the outright calls for direct military involvement of India. The escalating humanitarian crisis together with the inaction of the international community provided a justification for India's military intervention in East Pakistan. India became more directly involved in the warfare waged by *Mukti Bahini*, which eventually led to them gaining control over small enclave in East Pakistan in November 1971.[111] When Pakistani military attacked Indian airbases on 3 December 1971, India formally declared a war on Pakistan. Due to India's months long clandestine preparation for the military intervention, Indian troops quickly gained an upper hand. By 16 December 1971 the Pakistan Eastern Command surrendered, and Bangladesh de facto seceded from Pakistan. The state of Bangladesh was quickly recognised by dozens of states and, in 1976, by Pakistan as well.[112]

Was there a normative change triggered by the Friendly Relations Declaration that could explicate the difference in outcome between Biafra and Bangladesh? Arguably, there was no such alteration. The fact that the Friendly Relations

109 S/10410 OF 3 DECEMBER 1971.

110 Sonia Cordera, 'India's Response to the 1971 East Pakistan Crisis: Hidden and Open Reasons for Intervention' (2015) 17 Journal of genocide research 45.

111 See also, Ved Nanda, 'Self–Determination in International Law: The Tragic Tale of Two Cities–Islamabad (West Pakistan) and Dacca (East Pakistan)' (1972) 66 The American journal of international law 321.

112 Satish Kumar, 'The Evolution of India's Policy towards Bangladesh in 1971' (1975) 15 Asian survey 488.

Declaration gave a right for dependent peoples to seek and receive support for their attempt to use right to self-determination does not, strictly speaking, apply any more to Bangladesh than it does to Biafra. Also, a claim for self-defence by East Pakistan is a contradiction in terms, as there hardly can be a self-defence against your own government, which makes it also questionable whether Indian government could rely on aid to East Pakistan's right to self-defence as a justification for its military intervention. India could effectively refer to nearly ten million refugees within its territory as a threat to peace and security, but purely in normative terms, such threat does not legitimise use of military power, as the only legal ground outside a mandate provided by the Security Council is based on Article 51 of the UN Charter. Triggering said Article requires, however, an occurrence of an armed attack. Nothing in this basic nexus of statehood, sovereignty, self-determination, and secession changed in the years that separate Biafra from Bangladesh.

Some have seen in India's actions in Bangladesh an early instance of humanitarian intervention that gained ground in the 1990s, but that does not alter the legal argument concerning legality of secession in Bangladesh. There was nothing in the Friendly Relations Declaration or anything preceding it that would have provided a right to another state to pierce the veil of sovereignty and aid people subject to state brutality if the people in question were not colonial subjects. And even though East Pakistani people suggested that the subjugation of the East by the West in Pakistan amount to similar relationship as one between a metropole and a colony that argument was never accepted internationally. In the end, the sole decisive fact that separates Bangladesh from Biafra might be that 'Bangladesh won the war of secession, while Biafra failed.'[113] As such, Bangladesh's secession indicates, despite its success, the end of the line for the right to self-determination as a territorial claim. There was no legal solution to overcome sovereign prerogative to treat demands for autonomy as purely domestic affairs, despite the gross violation of rights of tens of millions.

3.1.3 Case of Western Sahara

> *"The policy implications of this view of self-determination are obvious and we do not need to dwell on them. It is a view which leaves peoples awaiting self-determination at the very margin of international law, as a "left-over" in the robust world of sovereign freedoms - and the more so when this perspective is coupled with the systematic reductionism in the classical role of the*

[113] J Castellino, 'The Secession in Bangladesh in International Law: Setting New Standards?' (1997) 7 Asian Yearbook of International Law 83, 101.

> *administering Power. That effectively guarantees that if a certain people awaiting self-determination is not in the middle of an ongoing war-and-peace environment, nothing will be done for them, because - happily - sanctions will never be ordered."*[114]

From the days of the UN Charter to the early 1970s, the right to self-determination in colonial setting had seen a rapid development. In the Charter, self-determination of dependent peoples remains merely a goal with no immediate due date for realisation. In the 1970 Action Plan accompanying the Friendly Relations Declaration, then again, colonies are already perceived as an outright violation of international law that ought to be immediately abolished. As the examples of Biafra and Bangladesh indicate, there was no general rule in international law for secessionism fuelled by self-determination, but as various General Assembly declarations from the 1950s onwards indicate, there was a steadily formed *opinio juris* in favour of such secessionism within the colonial context.

Therefore, the decolonisation of Western Sahara in the early 1970s appeared to have a clear legal outcome supported by *opinio juris* that already at the time had been cemented into a norm of customary international law. Western Sahara had been part of larger Spanish colony in the North-Western Africa, which after the independence of Morocco in 1956 had remained the sole possession of Spain in the region. The territory of Western Sahara, called the Spanish Sahara, was considered to be under the administering power of Spain at latest from 1965 onwards.[115] From that time to 1975, when Spain unilaterally relinquished its duties as an administering power,[116] the people of the-then Spanish Sahara had, according to the body of custom and law formed, a right to self-determination that would lead to secession of the territory from Spain.

Following Spain's withdrawal, the region became a battleground of competing claims between neighbouring Morocco and Mauritania, each seeking control over the territory no longer administered by Spain. This encroachment by neighbours ignited armed conflicts as the Polisario Front, the representative voice of the indigenous Sahrawi people, fervently advocated for self-determination and the establishment of an independent state in the territory of Western Sahara, the Sahrawi

114 CR 95/13, the case concerning East Timor (Portugal v. Australia), ICJ.

115 UN GA A/RES/2072 (XX).

116 For more info please see: Declaration of Principles on Western Sahara by Spain, Morocco and Mauritania (United Nations Treaty Series), (Came into force on 19 November 1975, the date of the publication in the Spanish Official Gazette of the Act authorizing the Government of Spain to implement its provisions, in accordance with paragraph 6.).

Arab Democratic Republic (SADR).[117] By 1979, Mauritania abandoned its claim for the Western Saharan territory,[118] leaving Morocco in effective control of most of Western Sahara. This has been the situation now for soon five decades, and the territory of Western Sahara remains to this day on the list of non-self-governing territories, supposedly on verge of self-determination and statehood.

Before any of the rivalries unfolded in the territory of Western Sahara, the General Assembly requested an Advisory Opinion from the International Court of Justice on status of Western Sahara in December 1974.[119] The Court denied the status of Western Sahara as *terra nullius* – a territory without an owner – and found that the indigenous Sahrawi people had an intimate connection to the land, even though the administering power had long rest outside the Western Saharan territory. While there had been administrative ties to both Morocco and Mauritania in the past, neither of those two countries could assert a legal claim over it based on those administrative borders alone. As such, the Court denied an expansive reading of *uti possidetis juris* principle, one that would have allowed former colonial administrative centres to expand their territory to cover areas that later managed to shed their dependency.

The Court opined that the people of Western Sahara were to be given a genuine and free option to choose their own future through exercise of their right to self-determination. Yet, this option was frustrated by march of both Moroccan and Mauritanian troops to its territory immediately after Spanish denouncement of its duties as administering power. However, for the United Nations, vote by the people remains to this day the sought-out solution for the impasse. The UN has actively facilitated dialogues between Morocco and the Polisario Front, aiming to achieve a mutually agreeable resolution founded on the principle of self-determination for the Western Saharan population. It has also brokered a series of ceasefire agreements, leading to the establishment of the UN Mission for the Referendum in Western Sahara (MINURSO) in 1991.[120] MINURSO's role encompasses organising a referendum to ascertain the political status of Western Sahara, yet progress has been

117 In the year 1975, Front Polisario declared the formation of the Saharan Arab Democratic Republic (SADR), asserting the independence of Western Sahara. While more than 80 nations initially recognized SADR, some of them later rescinded or temporarily halted their acknowledgment of the republic.

118 See also: S/13503, annex I;

119 Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16).

120 UN Security Council report S/1998/35; UN Security Council report S/1998/316; UN Security Council report S/1999/88, S/1998/35, S/1998/316; S/1998/404; S/1998/534; S/1998/634; S/1998/775; S/1998/849; The task of identification commission was also to analyze appeal cases. See: S/2000/461, S/2001/148, S/2001/398, S/2002/41, S/2002/178, S/2002/467, S/2003/59, S/2003/565, S/2004/39.

impeded by disputes concerning voter eligibility and the inclusion of independence as a voting option.[121]

> *"The difficulties in determining who among the Saharans is eligible to take part in the referendum were due, in particular, to the characteristics of the Saharan population, notably its nomadic tradition and the tribal structure of the Society. .. .. because of the nomadic way of life, the people of the Territory move easily across the borders to the neighbouring countries, where they are received by members of their tribes or even of their families. This ebb and flow of people across the borders of the Territory makes it difficult to take a complete census of the inhabitants of Spanish Sahara and also poses the complex problem of the identification of the Saharans of the Territory and makes it even more difficult to take a satisfactory census of refugees."*[122]

Morocco has put forth a proposal outlining autonomous governance under Moroccan sovereignty, while the Polisario Front advocates for a referendum encompassing independence as a choice. Despite numerous rounds of negotiations, a durable resolution for the situation has not been found.

Even though there is no final resolution on the protracted question of Western Sahara, the international legal argument on the matter remains straightforward. In its recent decision concerning Chagos Islands, the International Court of Justice had to decide whether there was, at the time of the partition in 1965, a right to self-determination in international law.[123] According to the Court, the separation of Chagos Islands from Mauritius before Mauritius gained independence in 1968 as well as removal of Chagossians from the islands was in violation of Mauritius's right to self-determination, and an act of maintaining colonial order. The Court found that '[b]oth State practice and *opinio juris* at the relevant time confirm the customary law character of the right to territorial integrity of a non-self-governing territory as a corollary of the right to self-determination.'[124] According to the Court, these rights were recognised at the time of the partition of Mauritius, wherefore they with equal rigour apply to the territorial integrity of Western Sahara. Thus, since Western Sahara was added to the list of non-self-governing territories in 1963, its territorial

121 UN General Assembly resolution 2229 (XXI), para – 5 (b), 20 December 1966; UN General Assembly resolution 3162 (XXVIII), 14 December 1973; Resolution 1394 (2002), 27 February 2002; Resolution 1406 (2002), 30 April 2002.

122 UN Security Council report S/2001/163.

123 Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019.

124 *Id.*, p. 95, para 160.

integrity has been an integral part of its exercise of the right to self-determination.[125] The fact that Spain together with Morocco and Mauritania agreed upon division of this land without hearing the people of Western Sahara then ought to constitute a violation of international law as it did in the case of United Kingdom in Chagos Islands.

Yet, this has not been the legal answer on the matter. After all, 'universally accepted principles of international law are never universally applied, even when they are widely endorsed.'[126] This is why Morocco's de facto annexation of Western Sahara has created a set of legal solutions, none of which resemble that one endorsed by the ICJ in *Chagos* or in *Western Sahara*. The United Nations' proposal advocates for affording the Sahrawi People the freedom to exercise their right to internal and external self-determination through a referendum—an endeavour that has eluded realisation for over five decades. Despite the Court stating in its Advisory Opinion on Western Sahara that '[t]he validity of the principle of self-determination […] is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory',[127] there has been no willingness for the UN to give up on a referendum that is unlikely to ever materialise. The best possible solution has overridden a possible solution.

An alternative to the UN impasse has been in recent years provided by the European Union and the United States. For the European Union, the answer to the question of Western Sahara and its status has surfaced through trade, as the goods originating from the territory of Western Sahara have been part of Morocco's exports to EU, even though EU's and its Member States formal position has been non-recognition of Morocco's claims over Western Sahara. In a series of court cases initiated by the Polisario Front, the Court of Justice of the European Union has had to decide how the goods originating from Western Sahara ought to be classified. The Court has, repeatedly, denounced Morocco's territorial claims, while finding intricate legal solutions to uphold trade between EU and Morocco nonetheless – goods originating from Western Sahara therein included. The EU Court's positions have been demanding for the interests of the people of Western Sahara to be respected when profit from trade is distributed, a demand that is difficult to align with the UN procedure of trying to find the people. While for the EU court finding the people with interest was seemingly possible, for the UN finding the people to cast a vote for the future has proven intractable problem for soon fifty years. Thus,

125 See, Rep. of the S.C. on the Situation Concerning Western Sahara, ¶ 14, U.N. Doc. S/2006/817 (Oct. 16, 2006).

126 Dennis Jett, 'Western Sahara's Unlearned Lessons' (2022) 29 Middle East policy 129, 134.

127 Western Sahara, Advisory Opinion, 1975 I.C.J. 12 (Oct. 16), para-59.r.

the EU maintains formal non-recognition while de facto accepting Moroccan annexation of Western Sahara.

The United States for its part has provided formal recognition to Morocco over Western Sahara,[128] a position it has not backed up even after the change of the executive. Although the Biden administration has not taken back the recognition of Morocco's title to Western Sahara provided by the Trump administration, it has softened the language in terms of the ultimate solution to the situation. [129]While the United States maintains that Morocco's proposal for an autonomous status for Western Sahara within Morocco is the preferred alternative, it has also voiced its support for the UN political process. The two are mutually incompatible as preferring Morocco's plan before organising the long-overdue referendum suggests that the outcome of the referendum is a foregone conclusion. Despite it being clearly in violation of international law, the position endorsed by the United States has enjoyed growing support as more and more states have become disillusioned by the never-ending story of the United Nations' quest for referendum in Western Sahara. Despite the intricacies of these narratives, the global community's action—or lack thereof—leaves the fate of Western Sahara hanging on the balance.

3.1.4 Conclusion

The history of colonial secession indicates a gradual formation of international law and its crystallising into norms of customary international law in span of two decades after the formation of the United Nations. As this legal nature of the right to self-determination became clearer, the formation of new states even within the colonial context became murkier. Already relatively early on in the process of decolonisation, there was a wide consensus especially among the African nations that the right to self-determination was confined to gaining independence from foreign rule within the former administrative boundaries of colonies (*uti possidetis*). This limit to the right to self-determination was clearly on display in the muted response to the brutality and violence in Biafra.

Yet, as the successful secession of Bangladesh from Pakistan shows, there was more than meets the eye in the legal constitution of the right to self-determination and its relationship to territorial integrity in international law. If anything, the secession of Bangladesh indicates the inherent limitations of peoples claims for self-

[128] Donald J. Trump, Proclamation on Recognizing the Sovereignty of the Kingdom of Morocco over the Western Sahara on 10 December 2020, available at: https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-recognizing-sovereignty-kingdom-morocco-western-sahara/

[129] See in general Jett (n 126).

determination, if those claims are not supported by power. The system of the United Nations is constituted around nation states, and even relatively late in the decolonisation process, there were no legal means to pierce the sovereign veil. State terror towards its own citizens, even on the scale that leads to ten million refugees as in the case of Bangladesh, is not in terms of international law an effective claim for suppressed peoples right to self-determination. Thus, despite Bangladesh's emergence as an independent state through secession, there is no law to support its secessionism neither the military intervention of India. Behind law stands—if not always at the very least in the case of Bangladesh—power. It is the success in projection of power that explicates different outcomes for Bangladesh and Biafra, not differences in interpretation of international law.

This project of power can muddle even a paradigm case of colonial right to self-determination as the situation of Western Sahara shows. There is no uncertainty over the legal nature of Western Sahara as a non-self-governing territory since 1963. Neither there is uncertainty what being a non-self-governing territory implies and what requirements it imposes to the exercise of right to self-determination. Yet, none of those legally mandated outcomes have materialised during those sixty years Western Sahara has remained on the list of non-self-governing territories. An annexation by a neighbouring country, whether de facto or de jure, has never been a decision of the people of Western Sahara, as the United Nations has been unable to define such people.

As such, the sui generis right of secession within the context of decolonisation has, in most senses, ran its course. A right to secede in a colonial setting has raised to a status of customary international law, yet there seems to be no means to enforce such right due to inherent complexity of the constituent parts of such right. Who are the people? How to ask for their opinion, and when to ask for their opinion? These are but some of the questions that international law has failed to provide an answer for, and it might be uniquely incapable of answering them. Yet, as Morocco has clearly indicated in Western Sahara, by challenging the people one can challenge the right to self-determination, and by challenging the right to self-determination one can refute the right to secession.

3.2 Non-Colonial narrative

There is more to secession in international law than the colonial secession, even though non-colonial secession has been a markedly rare occurrence. Despite rarity of non-colonial secession, there is a sizable body of case law and other legal materials on precisely this question. A point of depart of legal treatment of frustrated attempts to secession is commonly *Texas v. White*, a U.S. Supreme Court case on a

right to secession within a federal state.[130] The Court finds that acts of secession of Texas were null and therefore there was no secession and Texas had been part of the federation throughout the Civil War. But as Justice Grier makes clear in his dissent, already then, the debate revolved around on the one hand, the legal and, on the other hand, the political nature of secession. Grier J is adamant that the status of Texas during civil war 'is a question of fact, I repeat, and of fact only. *Politically*, Texas is not *a State in this Union.* Whether rightfully out of it or not is a question not before the court.'[131] And as before the U.S. Supreme Court, those who have claimed that a material or political fact of separation is what ultimately matters, have been on the losing end.

While the judgment of the United States Supreme Court focuses on interpretation of the U.S. constitution, the inherent dilemma of secession between its legal and political manifestations is a universal one. Many of the early secessions, whether in colonial or non-colonial setting, were predominantly political instantiations of force. Thus, when the Spanish colonies in the South America seceded during the 19th century, these secessions were not perceived as legal answers to political events. Rather, they were seen as signs of weakened Spain and the growing force of the colonies. As such, comparing the unsuccessful secession of Texas and successful secession of Mexico is markedly similar to the post-secession analysis between Biafra and Bangladesh: the other one managed to muster enough force to suppress the metropole, the other one did not. On this level, there is no space for legal analysis. A realist analysis of international politics transforming might into right suffices.

Yet, a closer look to international law on secession indicates that a purely political understanding of secession, like the one espoused by Grier J, has seldom been enough. After all, the Republic of Biafra managed to hold onto its title for three years, but that was not considered sufficient for permanent establishment of the title of statehood. A closer analysis of the way with which the South American states managed to uphold their independence reveals the significant role of international law in consolidation of their title. In a 1912 speech, recorded in the pages of the *Proceedings of the American Society of International Law*, the former Minister of Foreign Affairs of Costa Rica, Luis Anderson, declares that '[t]he Monroe Doctrine […] constitutes the corner-stone of [Latin America states'] existence as political bodies'.[132] And as Alejandro Alvaraz summed the doctrine at the time,

130 *Texas v. White*, 74 U.S. 700 (1868).
131 *Id.* 749.
132 Luis Anderson, 'Address of Honorable Luis Anderson, of Costa Rica, on The Monroe Doctrine and International Law' (1912) 6 Proceedings of the American Society of International Law at its annual meeting (1907) 72, 75.

> *the principles of the Doctrine are not only the idea of the United States, as ordinarily believed, but are the uniform conception and ideas of all the countries of this continent. For this reason these principles are the principles of the public American International Law.*[133]

Thus, the political question of Grier J could only be consolidated through a concomitant legal support for such claim.

3.2.1 Early Secessionism, Finland, and Aaland Islands

A similar pattern can be established with other early examples of secessionism in international law. The secession of Finland from the crumbling Russian Empire is a case in point. In Finland, there was a strong political will for independence that had led to political unrest and a strong nationalist movement from the late 19th century onwards. Already relatively early on, Finland had sought the support of European internationalists for its cause. Thus, when the Bolsheviks led by Lenin seized the power finally in October 1917, Finland saw an opportune moment to request for independence. Finland had, after all, acted as a safe haven for Lenin when he had fled Tsarist persecution. Moreover, Lenin had been openly advocating for a right of secession as a true embodiment of the right to self-determination.[134] And, in November 1917, Lenin together with Stalin had signed a Declaration of the Rights for the Peoples of Russia, which granted '[t]he right of the peoples of Russia to free self-determination, even to the point of separation and formation of an independent state.'[135] It was this right that Finland took note, and upon which the Finnish Senate relied when it declared independence formally on 4th of December 1917, and which received acceptance on 6th of December.[136]

While the formal declaration of independence through a national act altering the constitution marks the Independence Day of Finland, these early domestic acts did not immediately receive recognition from other states. The other states asked for recognition of Russia as a precondition for their recognition, highlighting the importance of former parent state's approval for secession. Once Finland received such acceptance on the last day of the year, the neighbouring countries together with Germany and France quickly recognised it. The Finnish secession marks a rare instance of a peaceful and orderly secessionism where political and legal institutions

133 Alejandro Alverez, 'Monroe Doctrine from the Latin-American Point of View' (1917) 2 Washington University Law Quarterly 135, 144–145.
134 See *supra*.
135 Declaration of the Rights of the People of Russia of 2 November 1917, available at: https://www.marxists.org/history/ussr/government/1917/11/02.htm
136 Suomen Kansalle, 4 December 1917, no 179/200 K.D.T.O.K. 1917.

align without the use of force by either side. In this sense, Finland's secession appears distinct from all the other peoples who gained their independence at the collapse of the Tsarist Empire. Unlike, for example, Poland and Ukraine, there was no war between the Soviet Russia and Finland during the early years of Finnish independence. As such, Finland's secession from Russia can with some merit be described as chiefly a legal affair, which constituted a space for politics.

But even a predominantly legal affair, such as Finland's secession from Russia, is not without intricate legal problems. Two years after Finland's secession, the Finnish state turned to the help of the most eminent jurists to settle the status of Aaland Islands.[137] Did the Swedish speaking people of the Aaland Islands have a right to self-determination and a consequent right to secede? After all, the Islanders themselves had openly sought to join Sweden and had organised a plebiscite to that effect which overwhelmingly supported leaving Finland to join Sweden. The newly found League of Nations set to solve the dispute over the extent of right to self-determination found the question difficult. The answer and framing provided remains illustrative of the promise and limits of self-determination for secession outside colonial context to this day.

At first stage, the League set a Committee of Jurists to answer whether an international organisation has the capacity and jurisdiction over territorial questions. The Committee's answer enforces the Westphalian idea of relatively unrestricted internal self-determination of a sovereign state, yet it upholds that not all sovereigns are the same. To this effect the Committee finds that 'in the absence of express provisions in international treaties, the right of disposing of national territory is essentially an attribute of the sovereignty of every State,'[138] and qualifies that such a right of disposing of national territory belongs unreservedly only to 'State which is *definitively constituted*.'[139] (emphasis added) Using this tiered notion of statehood, the Committee proceeds to note that Finland at the time was still in 'transition from a *de facto* situation to a normal situation *de jure*' wherefore the question of its territory was not 'confined entirely within the domestic jurisdiction of a State.'[140] Based on an analysis of the factual situation of Finland, the Committee concludes that it has competence to hear a matter that on a normal situation *de jure* would fall unreservedly to the Finnish state alone.

It then proceeds to analyse the actual claim, namely, the relationship between territorial integrity and the rights of a minority. At first, the Committee refuses to accept Finland's *uti possidetis* argument, employing once more a distinction between

137 League of Nations, Official Journal, October 1920.
138 *Id.* p. 5.
139 *Id.*
140 *Id.* p. 6.

de facto act of separation from Russia and its *de jure* recognition internationally. It finds that:

> *Finland cannot claim that the future of the Aaland Islands should be the same as hers, simply because of the one fact that the Islands formerly formed part of the Finnish political organisation in the Russian empire* [141]

Therefore, Finland's territory should be set through balancing the countervailing claims of the parties and not through a simple fiat of the contested sovereign. The Committee, however, does not complete such an analysis but restricts itself to the questions of justiciability of the matter before the Council of the League of Nations and the demilitarisation of the Islands. Upon receipt of the Committee's report, the Council decided upon establishment of a separate Commission to provide it promptly with a recommendation for conclusion of the dispute.[142]

The Commission departs from the interpretation of the Committee. Where the Committee highlighted the importance of Finland's transitional status shortly after independence, the Commission refuses to see any such indication, which leads it to conclude that:

> *the right of sovereignty of the Finnish State over the Aaland Islands is, in our view, incontestable and their present legal status is that they form part of Finland. To detach the Aaland Islands from Finland would therefore be an alteration of its status, depriving this country of a part which belongs to it.* [143]

The civil war and foreign support for the period of few months were not signs of missing independence, the Commission argues and suggests further that even longer periods of uncertainty over government have not denied independence in the past, as the example of the United States shows.[144]

Once the Commission has established both the sovereignty and the territory of Finland to be on a more solid founding than the Committee of Jurists, it turns into question on rights of minority and of self-determination. Does a minority have a right to withdraw from a state? The Commission denies such a possibility categorically as being antithetical to the very concept of a state.

141 *Id.* p. 10.
142 League of Nations, The Aaland Islands Question. Report submitted to the Council of the League of Nations by the Commission of Rapporteurs, 16 April 1921, 26/68/106.
143 *Id.* p. 25.
144 *Id.* p. 23.

> *To concede to minorities, either of language or religion, or to any fractions of a population the right of withdrawing from the community to which they belong, because it is their wish or their good pleasure, would be to destroy order and stability within States and to inaugurate anarchy in international life.*[145]

Thus, while a state in transition may more likely be a subject to international adjudication of its territory, according to the Commission, providing a right for minorities to secede would be contrary to the very notion of statehood. The Commission aligns with formal criteria of statehood and the principle of *uti possidetis juris* to justify its denial of the request of Aaland Islands to join Sweden against the will of its sovereign, Finland. While the Committee of Jurists suggests that '[b]y the application of a purely legal method of argument it might be said that a kind of acquired right exists in favour of the Aaland Islands which would be violated if Finland were allowed to suppress it retrospectively,'[146] the holistic analysis conducted by the Commission denies such a possibility. If anything, the Aaland Islands case indicates limits of a 'purely legal method' in matters of territory, quite like the purely political analysis of Grier J failed to come in terms of its own limitations.

3.2.2 From protection of minorities to humanitarian intervention

After the turbulent years at the end of the First World War, the question of secession largely disappeared outside the colonial context. Time and time again, international law and international lawyers aligned with the territorial integrity. Thus, when the heads of European states sat down in August 1975 to sign the Helsinki Final Act, any détente between the East and the West was conditional on non-interference and on upholding territorial integrity.[147] And even though the Final Act seemed to uphold a right for all peoples to self-determination, any aid or abetting to such cause was categorically barred in the Final Act. In the Cold War Europe, self-determination and secession were largely the dynamite to statehood that the League had deemed it to be in Aaland Islands decision.

Yet, there were subtle changes in the politics of secessionism. Already the Committee of Jurists in the Aaland Islands case had contemplated on the impact of grave violations of rights for legal justification of separatism, but it was the violent

145 *Id.* p. 28.
146 *Supra* n. 137, p. 10.
147 Conference on Security and Co-Operation in Europe Final Act, Helsinki, August 1 1975.

repression of separatism in Biafra and Bangladesh that rekindled the idea of piercing the sovereign immunity for humanitarian causes. During a 1972 roundtable discussion on international responsibility and genocidal conflict, the U.S. Senator Edward Kennedy demanded interference by other states to the atrocities perpetrated against peoples seeking secession. But as Louis Henkin was quick to remind, this political urgency had limited legal support; there was no international law preventing civil war or secession, but neither there was international law that would prevent suppression of secessionism by force. There simply was no law on secession and, further still, even though secessionism might lead to genocidal violence as it had in Biafra and Bangladesh, 'foreign military intervention […] ought to be illegal […as a] humanitarian reason for military intervention is too easy to fabricate.'[148] Henkin did not deny the presence of a humanitarian claim, but he was fully aware of its dark sides if wielded unilaterally by any state.

But with the thawing of the Cold War through, among others, the détente signalled by the Helsinki Final Act, the old certainties were gradually giving way to new law and politics of secessionism. In 1990, Estonia's Foreign Minister Lennart Meri made the argument loud and clear: 'The Estonian question and the Baltic crisis are not a matter of Soviet domestic policy […] The Estonian question and the Baltic crisis represent the unfinished business of the Second World War.'[149] And as the cataclysmic events of the collapse of the Soviet Union, dissolution of Yugoslavia, and the emergence of unipolar world order with a sole hegemon came to show, secession gained an entirely new legal status as not only a political solution but as a legal remedy to oppression – and, ultimately, a responsibility of the international community to uphold.

One of the first acts of this new order was to trample over Henkin's concerns. Even though humanitarian intervention had been intermittently used as a justification by States for use of force against another State from the 19th century onwards, it had fallen into desuetude by 1945.[150] There was no right to unilateral use of force against another State irrespective of the cause in the UN era. Yet, in the late 1980s and early 1990s, both the legal justifications provided for humanitarian intervention and its use in international relations exploded.[151] Rallying under the banner of human rights, democracy, and rule of law publicists and states alike saw a need to intervene in domestic matters triumphing over restraint. In a stark contrast to Henkin's concern

148 Edward Kennedy and others, 'Biafra, Bengal, and Beyond: International Responsibility and Genocidal Conflict' (1972) 66 The American journal of international law 89, 96.

149 Lennart Meri, 'Estonia's Role in the New Europe' (1991) 67 International affairs 107, 109.

150 Ian Brownlie, *International Law and the Use of Force by States* (Clarendon Press 1963).

151 Tesón (n 18).

over expansion of humanitarianism, many international lawyers saw '[t]he need to halt the horrors of genocide […] as sufficient justification for intervention, even if other motives may be involved.'[152]

The willingness to intervene altered the geography of secession as well. While initially the new-found humanitarianism of the post-Cold War era was to thwart annexationist desires of dictators, in quick order the responsibility to uphold rights and desires of peoples under oppression found its home in prevention of internal strife. In Africa, Asia, and Europe, the humanitarian intervention was seen as a tool to promote a right to self-determination often under the tutelage of an international authority, yet legal justification for use of international authority was hard to pinpoint. Thus the Security Council resolution justifying collective self-defence in Iraq in 1991 was leaving for some 'the precise source of its authority unstated,'[153] while others saw 'the legal background for this kind of multi-organisational co-operation'[154] in the international administration of Kosovo to be rather weak. According to Anne Orford, the function of such imprecise legal texts was to 'make sense of the relations between military intervention and developing states in terms of a deeper narrative and flow of meaning within which intervention stories are inserted.'[155]

These stories of intervention have produced the new law of secession internationally. While much has been written about the secession of Quebec, the desire of Scotland for independence, or of Catalonia's claims for statehood, they all have been managed as matters internal to the states in question, with voices and concerns of minority protection and right to self-determination resembling much what was already accomplished by the Aaland Islands decision. Kosovar and East Timorese secessions, on the other hand, illustrate a novel internationally (and militarily) mediated processes, where the narrative for justification has been predominantly humanitarian. At the same time, these mediated secessions have provided the intervening states and the international authority an opening to define themselves as an Other for the weak, developing state whose self-determination is in a need for external support and guidance.

But Henkin's warnings, even though momentarily pushed aside in the decade and some that rallied for humanitarian interventionism, have turned out to be

152 Anne Orford, *Reading Humanitarian Intervention : Human Rights and the Use of Force in International Law* (Cambridge University Press 2003) 6.

153 Burns Weston, 'Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy' (1991) 85 The American journal of international law 516, 526.

154 Matthias Ruffert, 'The Administration of Kosovo and East-Timor by the International Community' (2001) 50 The International and comparative law quarterly 613, 619.

155 Orford, *Reading Humanitarian Intervention : Human Rights and the Use of Force in International Law* (n 152) 159.

prescient. The humanitarianism of humanitarian intervention has been a pliable standard. Nowhere else has this standard been moulded and shaped more than in and around Russia. Since the peacekeeping and humanitarian intervention missions in Russia's near abroad in early 1990s, this area has become a hotbed for secessionism internationally. It has allowed Russia to communicate domestically its strengths in opposition to corrupt weakness of its neighbouring countries. It is this specific Russian understanding of secessionism that marks the end of the line for non-colonial secession.

3.2.3 Russia, secession, and neo-imperialism

Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, Crimea, Donetsk, and Luhansk. The list of internal conflicts with separatism in the Russia's near abroad has been remarkable. Also, Russia's involvement in those conflicts has been nothing short of notable. It has commonly acted both as a peace breaker and a peace broker. But while these regional developments and Russia's involvement in them has been notable, the legal forms that have been employed by the Russian Federation are the ones familiar from the arsenal of post-Cold War international law. To understand Russia's recurrent resort to secession, annexation, or forms thereof in its regional relations calls for attention to Russia's understanding of international law and Russia's construction of a national identity in the aftermath of the collapse of the Soviet Union.[156]

Reading the first signs of something new is always difficult. There are mixed messages, conflicting signals, hopes, desires, and dreams that are all true to an extent. Russia's active uptake of peacekeeping and humanitarianism after the collapse of Soviet Union was read already early on as either an active embrace of liberal values of democracy, rule of law, and human rights or a cynical ploy to uphold its control over the former Soviet republics. In formal legal understanding, Russia actively engaged in multilateral and bilateral regionalism that promoted peace and security and resorted to international fora to formalise these institutional structures. The mixed messages between the reality of Russia's actions supporting separatism in, for example, Abkhazia in 1992, and its formal legal support for peace and stability was brushed aside as signs of internal strife between the new and the old guard.

This ambivalence is well at display in a note verbale dated 25 December 1992 from the Georgian Foreign Ministry to the Secretary-General. In an enclosed letter, the country's president Eduard Shevardnadze first notes as particularly disturbing

[156] See generally, Tero Lundstedt, 'Inherited National Questions: The Soviet Legacy in Russia's International Law Doctrine on Self-Determination' (2020) 89 Nordic journal of international law 38.

'the participation of the Russian troops stationed in Abkhazia on the side of Abkhaz extremists,' only to brush this off as clearly 'being directed by the reactionary forces ensconced within the political circles of the Russian Federation' opposing Boris Yeltsin's government.[157] The reality of Russian interference on Georgia's civil war in tanks, planes, and troops is pushed aside as a mere failure to uphold Russia's genuine intentions codified in the Moscow Agreement[158]. After all, according to Agreement's article 9, '[t]he armed forces of the Russian Federation which are temporarily located in the territory of the Republic of Georgia […] shall remain strictly neutral and shall not take part in internal disputes.'[159] In the understanding of the Georgian head of the state, the use of force by Russian military in violation of the Agreement was an anomaly that the rightful authorities would correct in due course.

Shevardnadze's letter is clearly one of seasoned politician, and it might be that he saw beyond the legal veneer of Russia's actions but was fully aware that the Security Council would never condemn actions of one of its five permanent members. But the ambivalence towards Russia's policies was not limited to career politicians. Also scholars critical to the peacekeeping and humanitarian interventions of the Russian Federation were quick to note how 'dangerous [it is] to speak of Russia in unitary terms,' even when they saw in Russia's actions a 'bid to retrieve its former economic, military and political hegemony over the former USSR.'[160] Many of the foreign commentators saw in Russia a fragile state in need of economic shock therapy and competent governance structures or it would succumb to tribalism between feuding factions, a role that Russian leadership seemed eager to partake. As Lilia Shevtsova noted with hindsight, '[t]he post-Cold War world […] created the ideal arena for Russia's game of misleading and pretending. The West's eagerness to engage Russia led it to believe the Kremlin when it paid lip service to Western values.'[161] The price of accommodationist policy towards Russia and a belief in its liberalisation through market economy was paid by countries in its near abroad.

Many legal commentators perceived these concerns over Russia's use of the available legal forms a challenge to doctrinal purity as they

157 United Nations Security Council, Note Verbale Dated 25 December 1992 from the Ministry of Foreign Affairs of Georgia Addressed to the Secretary-General, UN. Doc. S/25026 of 30 December 1992.

158 Moscow Agreement, 3 September 1992.

159 S/24523, Letter dated 8 September 1992 from the charge D'Affaires A.I. of the permanent mission of the Russian Federation to the United Nations addressed to the Security Council, 8 September 1992, article 9.

160 Terry McNeill, 'Humanitarian Intervention and Peacekeeping in the Former Soviet Union and Eastern Europe' (1997) 18 International political science review 95, 98.

161 Lilia Shevtsova, 'Forward to the Past in Russia' (2015) 26 Journal of democracy 22, 23.

> *put an intolerable burden on the international lawyer, completely unprepared to answer questions such as whether or not the people of South Ossetia in Georgia are entitled to exercise a right of self-determination by uniting with their northern kin in Russia—and whether Russian assistance for that purpose might be legitimate under the UN Friendly Relations Declaration of 1970.*[162]

Arguably, there never were any such rights to burden the international lawyer to begin with nor did the Friendly Relations Declaration ever justify an intervention to civil war, as clearly shown by the unease in the 1970s to situation in Bangladesh and India's military intervention. It was only a challenge to doctrinal purity in the newly minted world of humanitarian interventionism that had lowered the threshold for the use of force in international relations. Denying a right to humanitarian intervention and preventing peacekeeping missions from Russia while legalising similar missions by the U.S. would run counter to purported universalism of international law.

In the immediate aftermath of the collapse of the Soviet Union, there was also a dilution of responsibility to a wider network of institutional actors, most notably the Commonwealth of Independent States ('CIS').[163] CIS seemed at first sight a regional organisation created to promote co-operation among its Member States, drawing comparisons to other regional organisations, such as the European Union. Yet, unlike other regional organisations, '[m]uch of the problem was that the major security threat to CIS states came […] from within the CIS itself, which, in most cases, meant from Russia.'[164] CIS provided a legal umbrella that allowed Russia to deploy its military to other CIS countries by referring to these missions as peacekeeping, humanitarian intervention, and later humanitarian cooperation.[165] The appearance of commonly agreed upon security apparatus or an invitation by legitimate authorities was throughout the 1990s used as a justification for deployment of Russian troops within the borders of other CIS countries.

These missions and the leading role of Russia in CIS allowed it to project an image of itself as the sole power able to restore order and provide security in the

[162] Koskenniemi, 'National Self-Determination Today: Problems of Legal Theory and Practice' (n 82) 243.

[163] See in General, Michael R. Lucas, "Russia and the Commonwealth of Independent States: The Role of the CSCE." *Helsinki Monitor*5 (1994): 5.

[164] Paul Kubicek, 'The Commonwealth of Independent States: An Example of Failed Regionalism?' (2009) 35 Review of international studies 237, 242.

[165] Natalia Morozova, 'Resisting the West, Forging Regional Consensus: Russia's Discourse on Humanitarian Cooperation in the Commonwealth of Independent States' (2018) 23 Geopolitics 354.

region. The appearance of the former Soviet Republics as weak and disorderly and Russia's support to them was equally much a vision for constructing the Russian nation as it was about willingness to avert escalation of crises from internal to international. In revisioning Russia after the collapse, '[t]he national patriots […] developed an "imagined history" of the Soviet era […which] had the political merit of appropriating the achievements of the Soviet Union for the "Russian idea" by attributing them uniquely to the ingenuity and tenacity of the Russian people.'[166] In the middle of a chaotic remaking of the Russian society, its capacity to uphold order in its vicinity also gave the Russian people a semblance of order—if not in absolute terms, at least in contrast to their former Soviet countrymen. Understood through the lens of Russian state- and world-making, the regionalism allowed it to assert power, while it internationally seemed to align with the triumphant liberal values of the era.

By the turn to 21st century, much of the regionalism that had shielded Russia's use of military forces in its neighbouring countries was in death throes, as CIS had failed to live up to its promise in economic, military, and political terms. Since Russia's invasion of Chechnya, 'the leaders of [CIS] countries saw […] Russia's switching from a pro-Western and cooperative policy to a more introvert, revisionist attitude which aimed at restoring the status and borders of the former Soviet Union.'[167] This did not have a notable impact on Russia's capacity to project its power in the neighbouring countries. On the one hand, Russia had markedly little need for further legal justification for the presence of its troops in the neighbouring countries. There were existing bilateral agreements that allowed permanent deployment of Russian peacekeepers, for example, in Abkhazia.[168] On the other hand, Russia had moved from tumultuous post-Soviet era to governance of some stability with an economy that was providing sought-after affordable energy to its European neighbours. In many ways, Russia was seen as an emergent power yet again, which gave it more space to manoeuvre in its immediate neighbourhood, even without a contractual basis. It had also seen that even significant use of force on its backyard would not deter its Western partners.

This shift in the regional policies alerted many of the CIS countries, Georgian therein included. As there was a growing concern over the use of military power by

166 Wendy Slater, 'Russia's Imagined History: Visions of the Soviet Past and the New "Russian Idea"' (1998) 14 The journal of communist studies and transition politics 69, 74.

167 Svante Cornell, 'International Reactions to Massive Human Rights Violations: The Case of Chechnya' (1999) 51 Europe-Asia studies 85, 93.

168 Agreement on a Cease-Fire and Separation of Forces, signed in Moscow on 14 May 1994, S/1994/583; Agreement on a Cease-Fire in Abkhazia and Arrangements to Monitor its Observance, S/26250; Agreement on Principles of Settlement of the Georgian – Ossetian Conflict on 24 June 1992.

Russia to assert its claims, many countries in Russia's neighbourhood started to look for security and stability elsewhere. In Georgia, this meant a change of power and a realignment of country's foreign policy. An economic integration within the European Union and a security cooperation with NATO became constitutionally defined leitmotifs of new Georgian foreign policy.[169] For the first time since re-gaining its independence, Georgia was distancing itself politically and militarily from Russia, even though for economy Russia remained an important partner. It also meant a readjustment in Georgia's cultural alignment with Russian language and culture losing to English language and American culture. But despite these political shifts, in strictly legal terms little changed: there were no new security guarantees nor any regional co-operative organisations to replace the CIS.

For Russia this realignment of Georgia, among others, was unfortunate. In the years since the collapse of the Soviet Union, Russia had fostered an idea of its regional importance – even a sphere of influence – that seemed to be quickly eroding. Simultaneously, the 'Russian idea' that had been promoted by religious-nationalist forces in the Russia of 1990s had gained mainstream acceptance in the 21st century Russia. While the Russian Federation had since its inception been openly positioning itself as a guardian of the large Russian speaking minorities in its neighbourhood, during the first decade of the new millennium it expanded its role to a guardian of 'traditional values'. These values were targeted directly against the (liberal) European human rights regime that Russia had willingly joined some decades earlier, but they also served an important nation-making function. In 2013, when addressing the Federal Assembly, Vladimir Putin contrasted the spiritual, traditional society to 'a primitive state' trampling traditional values. Russia portrayed itself as a bulwark against degenerative forces of liberalism, wherefore Western alignment was an alignment against Russia.

The origin of this positioning against the liberal human rights in Russia predates its August 2008 war in Georgia. Russian Orthodox Metropolitan Kirill, in a speech in a panel discussion at the Human Rights Council's meeting on 18 March 2008 made it clear that the Russian Orthodox church found little good in universal aspirations of human rights.[170] He argued that abstract human rights violate religious sentiments and morality and are 'used by some countries as a tool for their national interests' this being 'particularly evident in the conflict regions of the planet' such

169 Constitution of the Republic of Georgia, art. 2.

170 Human Rights and International Dialogue, Speaking at a panel discussion on 'Human rights and intercultural dialogue' at the 7th session of the UN Human Rights council, Geneva, March 18, 2008.

as Kosovo.[171] These words of Kirill were taken as a basis for three consecutive traditional values resolutions that Russia promoted at the Human Rights Council, but before any of those resolutions passed, Russia itself employed the human rights narrative much akin to the one used in Kosovo to justify its use of force against Georgia and the subsequent recognition of Abkhazia and South Ossetia as independent entities.

Russia's position with regard to its support for self-determination and secessionism in its near abroad has since the collapse of Soviet Union been marked with hypocrisy. During the 1990s the core element of this hypocritical attitude to international law was Russia's employment of peacekeeping to violate peace. Time and time again the Russian peacekeeping troops were set to a mission to prevent conflict resolution and to maintain crisis, as the weakness in its neighbourhood allowed Russia to develop its nationalist 'Russian idea' as a great power, bringing order to chaos. Due to the limited geopolitical interest for Caucasus and Central Asia in the 1990s, Russia's actions remained largely unnoticed or at least without consequences for Russia. In an international community shaped by greater willingness to recourse to military intervention to address humanitarian concerns, Russia was quick to note that there were no universal standards for humanitarianism. It could act without consequences behind the fig leaf of human rights.

The early interventionism to support separatism in the name of humanitarianism had been speaking to a Russian imagined history of 'Russian people as the "leading and guiding force"'.[172] But for the 'Russian idea' to be complete, there had to be '"cosmopolitan" forces which […] aimed to destroy the country.'[173] (idem.) These forces are at clear display in Metropolitan Kirill's speech. They are 'extreme feminist views and gay attitudes' as well as 'the active development of a commercial industry filling society with propaganda for an immoral lifestyle'.[174] Human rights and their promotion were the cosmopolitan rot that was aiming to destroy the Russian nation but has not barred Russia from borrowing its nomenclature to justify its repeated incursions to the territories of its neighbouring countries. Russia protected the Russian order and the Russian, traditional values inspired understanding of human rights.

That Russia has for more than three decades been able to employ the language of international law to serve its opposite, and its capacity of hypocritical uptake of

171 Human Rights and International Dialogue, Speaking at a panel discussion on 'Human rights and intercultural dialogue' at the 7th session of the UN Human Rights council, Geneva, March 18, 2008.
172 Slater (n 166) 73.
173 *Id.*
174 *Supra* n. 170.

values and goals it elsewhere condemns, aligns with Rob Knox's reading of the role of hypocrisy in international law.[175] But focusing solely on Russia's hypocrisy in its use of international law to support separatism and secessionism misses the larger point of the Russian agency, which has been geared towards a Russian world-making—in fulfilment of the imagined 'Russian idea' of Russia as a leading and guiding force against cosmopolitan threats. It is a world-making that aims at restoring a historical past of greatness, an imperial dream. It is a world-making that sees constant threats to Russia in the other projects of world-making in its neighbourhood. But at the same time, it is a hypocritical or cynical end of the line for international law of secession in the post-Cold War era. And it is a reminder of Henkin's warning that a 'humanitarian reason for military intervention is too easy to fabricate.'[176]

[175] Robert Knox, 'Imperialism, Hypocrisy and the Politics of International Law' (2022) 3 TWAIL Review 25.

[176] Kennedy and others (n 148) 96.

4 Conclusion

The genesis of this dissertation stemmed from the profound sense of invisibility experienced within the international community. It was born out of the anguish of being overlooked, left to fend alone against the imposing might of the Russian Federation. The absence of support, be it military, economic, or humanitarian, was keenly felt, leaving individuals and communities stranded, their pleas for assistance falling on deaf ears. This pervasive sense of being unseen compelled a reaction, igniting a drive for action and progress.

During the conflicts in Abkhazia and Samachablo in 2008, as well as earlier in 1992-94, it was a formidable challenge to substantiate, document, and comprehend the atrocities perpetrated by the Russian Federation, similar to the challenges faced in Ukraine in 2014. However, the landscape shifted differently in 2022, when Ukraine found itself embroiled in a war with Russia. Ukrainian people took to online platforms to livestream the harrowing realities of Russian aggression, rendering the plight of the nation more visible to the global audience. Unlike in 2008, there was no disputing the aggressor, no denying the orchestration of military hostilities and egregious human rights violations by Russian forces in places like Bucha and Mariupol. For instance, during the 1992-94 conflict, the Georgian side was unable to substantiate claims of Russian military atrocities, such as the barbaric act of playing football with the heads of Georgian civilians on the beaches of Gagra, Abkhazia, which epitomized the despair of being voiceless in the face of external aggression. The sensation of helplessness against a monstrous force wreaking havoc with impunity underscored the urgency of shedding light on these injustices. At that particular time and ever since the conflict started, I share the feelings expressed by Mr. Riad Malki, Minister for Foreign Affairs and Expatriates of the State of Palestine:

> *It means you can spend the entirety of your life as a refugee, denied your dignity and your right to return home. It means your life and family, your community and home are under constant threat; your loved ones can be taken away and thrown in an Israeli jail, held there indefinitely. Your land can be stolen, colonized and annexed without hesitation. Freedom is nowhere to be found,*

there is no safe haven. It means discrimination everywhere and no justice, anywhere.[177]

Georgian sentiments of pain, anger, and frustration directed towards the Russian Federation mirror those experienced in the Georgian Abkhazian secessionist conflict analyzed in this dissertation. The evolving nature of secession since the Cold War's conclusion presents a multifaceted concept lacking a definitive definition. Amidst ongoing secessionist narratives globally, Abkhazia, situated in North-Western Georgia, emerges as a distinct case intertwined with the Russian Federation's role in the post-Soviet landscape. Despite lacking clear alignment with internationally recognized secessionist criteria, Abkhazia embodies certain characteristics shared by historical secessionist movements, indicative of a unique secessionist paradigm influenced by the Russian Federation's involvement.

The roots of the Georgian-Abkhazian conflict trace back to the aftermath of the October Revolution of 1917, instigated by the Russian Empire. This conflict, marked by a complex interplay of ethnic tensions, has plagued Georgia for over a century, hindering its pursuit of independence. This dissertation has unveiled how Russia strategically fomented and exploited ethnic tensions between Georgians and Abkhazians to destabilize Georgia through incessant secessionist pressures.

Firstly, the establishment of the Sokhumi Okrug, detailed in the first article of this dissertation, illustrated the deliberate ambiguity surrounding its borders and status since 1917. Secondly, the consistent minority status of the Abkhaz in the region served as a pretext for Russia's systematic extermination and forced displacement of Georgians, replacing them with settlers of various nationalities lacking any historical or territorial connection to the region. Finally, the Soviet era witnessed the preferential treatment of Abkhazians over other Georgians (Megrelians, Kakhetians, Svans, Gurians, etc.), exacerbating internal divisions within Abkhazia and fostering a sense of superiority among them. This narrative underscores Russia's calculated efforts to exploit and exacerbate ethnic divisions within the rest of Georgia, perpetuating instability and conflict in the region. The seeds sown in 1917 bore fruit during the 1992-94 secessionist conflict and the subsequent events of 2008, where Russia assumed a party of the conflict rather than a mediating role, underscored the instrumentalization of the right of self-determination in the Abkhazia case. Rather than respecting a legitimate expression of Georgian sovereignty, the right of self-determination became a tool wielded by

[177] Public sitting on the Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Request for advisory opinion submitted by the General Assembly of the United Nations), CR 2024/4, 2024 p. 51.

Russia to further manipulate the Georgian government and exacerbate conflicts. Moreover, Abkhazia's trajectory increasingly reflected its status as a de facto puppet entity under the influence of the Russian Federation.

This delves into the complex issue of Abkhazia's claims for secession. In the dissertation, I traced the evolution of secession law from the early 20th century to the contemporary era and reconciled these legal developments with Abkhazia's unique circumstances. The analysis suggested that Abkhazia's quest for secession, along with similar cases emerging from the post-Soviet landscape, deviates from traditional models of legal and legitimate secession. Instead, it presents a novel and distinct form of secession that unifies several singular elements from other forms of secession but creates a different case typical for the post-Soviet space. This distinctive modality of secession leads to a tragic outcome for involved parties, at least for Georgia as a sovereign state and Abkhazia as its secessionist region, perpetuating a perpetual state of uncertainty and instability within the post-Soviet regions. As such, the Abkhazia secessionist case in this dissertation highlights the intricate complexities surrounding the issue of secession and sovereignty in contemporary international law. The second article of the dissertation demonstrates that even in times of fragmented international law, Abkhazia, similarly to Western Sahara, cannot challenge its independence through economy or other means. The nitty-gritty details of CJEU's procedural norms make it impossible. This study demonstrates that there is no hope for Abkhazia outside being under Russian control and stuck in legal limbo, waiting for something – sovereignty and recognition – that will never materialize.

Western Sahara represents another scenario of self-determination gone wrong, marking a failure of decolonization. It serves as an illustrative example of a departure from traditional norms, offering a new perspective on the complexities of decolonization. Despite extensive discourse on the planned trajectory and materialization of decolonization, Western Sahara stands as an exception to established rules. In particular, it exemplifies a prolonged state of legal ambiguity spanning five decades, highlighting the inadequacies of traditional frameworks in addressing such complexities. This case underscores the potential for questioning statehood through economic avenues, as elaborated upon in this dissertation. The interplay between the secessionist ambitions of sub-state entities like Western Sahara and the proliferation of bi- and multilateral economic treaties signifies a notable functional fragmentation of legal norms, potentially leading to a nuanced revaluation of sovereignty. Ultimately, the legal recognition of sub-state entities' ability to engage in legal processes under specific provisions opens new avenues for advocacy and discourse, highlighting the complex interplay between law and politics in the context of secessionist movements. This dissertation demonstrates that even the decision to grant Front Polisario standing in the CJEU does not automatically mean recognizing those entities as independent states.

Within the realm of international law, the concept of recognition presents a multifaceted landscape, often influenced by pragmatic considerations rather than strict adherence to legal norms. In the case of Western Sahara, Morocco has wielded significant influence, consistently derailing decisions related to the self-determination of the Sahrawi people. By leveraging its political clout and economic incentives, Morocco has effectively sidelined discussions on recognition, prioritizing its own interests over the rights of the Sahrawi population. This manipulation of recognition processes underscores a selective interpretation of international law, wherein certain actors assert control over determining the rules of engagement based on their own agendas. However, this does not signify a complete disregard for international law but rather a strategic appropriation of its provisions to serve vested interests.

In order to generalize and present a full picture of the law of secession and self-determination, this dissertation analyzed a wider array of different cases. By synthesizing these theories and empirical cases, the dissertation sought to provide a comprehensive framework for understanding the complexities of state formation through secession. It elucidates the intricate interplay between historical context, political dynamics, and legal principles, laying the groundwork for the subsequent exploration and analysis within the dissertation's three articles and the introduction.

The young woman who evinced first hand the destructive force of abstract international law is no more. She believed in purity of law and erudition's capacity to eradicate all stains of political meddling from application of international law. I do not believe so anymore. I am no longer convinced that there is a right solution to a legal problem, even though I am steadfast in my belief that I still can recognise a moral wrong when I encounter one. I still cannot find a justification for the acts of Russia and its leadership that scarred me, my generation of Georgians, and our home country. But I am not certain this moral rectitude allows me or anyone to solve a problem of secession that is beyond right and wrong.

To borrow Alex Green's description, it is difficult to see what one is trained to unsee.[178] Territorial sovereignty allows no variations. It is absolute and unique. Two states cannot overlap and claim to be on top of one another. And by being exclusionary, sovereignty bars the entry of some while welcoming that of others. Yet, it is difficult to perceive what is this quality that cannot overlap and what a breach of that quality means. But before we can visualise what an overlap of sovereignty would look like, there is little hope for a transition to tolerance in states torn asunder.[179]

178 Green (n 33).
179 ibid.

The first step in this process is to see that what has been unseen. In Georgia, it is opening the painful memories of the past – not for securing political points or legal justification, but for coming in terms with the limitations of the dreams of our past political leaders. But such past dreams of world-making should not confine the present solutions. For far too long Georgia and most countries in the Russian neighbourhood have been living the dreams of Russians, which have been nothing short of nightmares to most of us. There is no need nor justification anymore for Russian participation in any process of reconciliation. A peacekeeper breaking peace prevents us from seeing the solutions it wants us to unsee.

In more general, the past decades of Russian interpretation of the right to self-determination shows that unilateral humanitarian intervention was a doctrine that was ripe for abuse, and those who ever condoned such practice should come in terms with its long-lasting legacy. International law is a powerful discursive narrative that should not allow a carte blanche for those willing to abuse it. If even a precise and widely accepted norm of international law, such as the right to self-determination for non-self-governing territories is subject to malign uptake, as Western Sahara's frustrated attempts to use such right has indicated, there is little to be gained by creating superfluous rights for the powerful to employ.

But international law and international lawyers have shown their ingenuity in coming up with solutions. A recent case between Gambia and Myanmar at the ICJ shows how the pliable norms of international law that have allowed their instrumental use for promotion of Russia's imperial conquest are capable of a different uptake as well.[180] In the suit, the Court accepted that Gambia had a standing based on a human rights convention, creating a precedent for *erga omnes* standing internationally. A similarly creative re-reading of the fabric of international law could allow us to see those solutions for peaceful coexistence that the recent emergence of nation states has barred.

[180] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Judgment of 22 July 2022.

Abbreviations

UN	United Nations
EU	European Union
US	United States
LN	League of Nations
GA	General Assembly
ICJ	International Court of Justice
OAU	Organization of African Unity
SC	Security Council
MINURSO	UN Mission for the Referendum in Western Sahara
USSR	Union of Soviet Socialist Republics
CIS	Commonwealth of Independent States
ICCPR	International Covenant on Civil and Political Rights
UNGA Resolution	United Nations, General Assembly Resolution
UNGA	UN General Assembly
UN Charter	United Nations Charter
Montevideo Convention	Montevideo Convention on Rights and Duties of States
NATO	North Atlantic Treaty Organization
R2P	Responsibility to Protect
CJEU	Court of Justice of the European Union
ICC	International Criminal Court
PCIJ	Permanent Court of International Justice
IMF	International Monetary Fund
WTO	World Trade Organization
FTAs	Free Trade Agreements
BITs	Bilateral Investment Treaties
ISDS	Investor-State Dispute Settlement
TFEU	The Treaty on the Functioning of the European Union
VCLT	The Vienna Convention on the Law of Treaties
AA	Association Agreement
SADR	Saharan Arab Democratic Republic

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